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"THE MOTHER OF ALL BALANCING TESTS": *STATE V. ARIEGWE* AND MONTANA'S REVISED SPEEDY TRIAL ANALYSIS

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I. INTRODUCTION

The conduct that resulted in the State of Montana charging Kingsley Ariegwe with felony and misdemeanor sexual offenses probably constituted a few hours of his life. One year and six continuances later, Ariegwe moved the district court to dismiss the case against him on grounds the delay violated his constitutional right to a speedy trial.[1] The court denied his motion and the case proceeded to trial, where a jury found him guilty of attempted sexual intercourse without consent and unlawful transactions with children.[2] The court sentenced Ariegwe to fifty years in the Montana State Prison.[3]

Ariegwe appealed his convictions to the Montana Supreme Court, arguing, among other things, that the district court erred in denying his motion to dismiss for lack of a speedy trial.[4] Although the Court ultimately rejected his appeal, in doing so it recognized an opportunity to revisit almost a decade of speedy trial jurisprudence.[5] When the dust settled—or rather, the typing ceased—Montana would have a "new" right to speedy trial analysis feared by one justice to be "the mother of all balancing tests."[6]

The new analysis began promisingly, with a return to the sparse balancing test promulgated by the U.S. Supreme Court in *Barker v. Wingo*[7] in 1971. However, the Court did not stop there. Rather, it proceeded to flesh out that test with an extraordinary amount of detail. Ultimately, in its struggle to achieve greater consistency and clarity, the Court may have sacrificed the "necessarily relative"[8] nature of a right the U.S. Supreme Court "ha[s] deemed fundamental,"[9] while achieving little, if any, greater consistency.

1. *State v. Ariegwe*, 167 P.3d 815, 825 (Mont. 2007).
2. *Id.*
3. *Id.* at 826.
4. *Id.* at 823.
5. *Id.* at 826.
6. *Id.* at 864 (Rice, J., concurring).
7. *Barker v. Wingo*, 407 U.S. 514 (1971).
8. *Beavers v. Haubert*, 198 U.S. 77, 87 (1905).
9. *Barker*, 407 U.S. at 529–30.

II. Procedural Background

In January 2003, Kingsley Ariegwe was a thirty-five-year-old youth counselor living with his ex-wife and their two children.[10] On January 17, he brought to his home a fifteen-year-old girl, "K.M.", whom he had met in an Internet chat room two days earlier.[11] While Ariegwe and the girl provided dramatically differing testimony as to what happened in Ariegwe's basement that day,[12] the girl subsequently told her parents she had an involuntary sexual encounter with Ariegwe.[13] Upon learning that police were investigating him, Ariegwe turned himself in, thinking they wanted to talk to him about giving K.M. alcohol.[14] Police arrested him and detained him for four days, until he posted bond and was released.[15]

On February 7, 2003, the State of Montana charged Ariegwe with felony sexual intercourse without consent and misdemeanor unlawful transactions with children.[16] Ariegwe pled not guilty, and the district court set his trial for May 13, 2003.[17] However, the court subsequently postponed the trial date five times.[18] Some of those delays were attributable to the State, and some were attributable to Ariegwe.[19]

On December 16, 2003, the State amended its information to add an alternative charge of attempted sexual intercourse without consent, a felony.[20] Two days later, Ariegwe pled not guilty to the new charge, and the district court reset his trial for January 5, 2004. However, on December 23, the court vacated that trial date because the parties awaited forensic test results from the state crime lab.[21]

At a status hearing on January 22, 2004, Ariegwe's lawyer confirmed he had received the crime lab reports, and the district court scheduled a trial for March 1, 2004.[22] Shortly after the

10. *Ariegwe*, 167 P.3d at 824, 857.
11. *Id.* at 824.
12. *Id.*
13. *Id.* at 825.
14. *Id.*
15. *Id.*
16. *Ariegwe*, 167 P.3d at 825.
17. *Id.*
18. *Id.*
19. *Id.* at 852–54.
20. *Id.* at 825.
21. *Id.*
22. *Ariegwe*, 167 P.3d at 825.

hearing, Ariegwe filed a motion to dismiss on grounds his right to a speedy trial had been violated, and the court denied the motion.[23]

Ariegwe's case proceeded to trial as scheduled on March 1, 2004.[24] The jury found him guilty of attempted sexual intercourse without consent and unlawful transactions with children.[25] The district court sentenced Ariegwe "to fifty years in the Montana State Prison, with fifteen years suspended."[26] Ariegwe timely appealed his convictions on three grounds, one of which was that the district court erred in denying his motion to dismiss for lack of a speedy trial.[27]

III. Federal and State Rights to Speedy Trial

A. *The Federal Right to Speedy Trial under the Sixth Amendment and* Barker v. Wingo

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."[28] This right can be traced back to the Magna Carta of 1215 and even the Assize of Clarendon,[29] although it remained largely dormant for another four hundred years, until the writings of Sir Edward Coke introduced the right as a significant legal concept in the American colonies.[30] Even so, it was not until 1905 that the U.S. Supreme Court addressed the right to speedy trial for the first time, in *Beavers v.*

23. *Id.*

24. *Id.*

25. *Id.* The jury acquitted Ariegwe of the charge of sexual intercourse without consent. *Id.*

26. *Id.* at 826. The district court suspended 15 years of the prison sentence and also sentenced Ariegwe to 6 months in a county detention center, to run concurrently with the prison sentence. *Id.*

27. *Id.* at 823. Ariegwe also appealed his conviction on grounds that the district court abused its discretion in denying his motion for a new trial, and that its restitution order was illegal. *Id.*

28. U.S. Const. amend. VI.

29. *Klopfer v. N.C.*, 386 U.S. 213, 223 (1966); Natalia Nicolaidis, *The Sixth Amendment Right to a Speedy and Public Trial*, 26 Am. Crim. L. Rev. 1489, 1489 (1988–1989) (citing Magna Carta, ch. 40 (1215), *reprinted in* J. Holt, *Magna Carta and Medieval Government* 239–57 (Hambledon Press 1985)).

30. *Id.* at 1492 (citing Edward Coke, *The Second Part of the Institutes of the Laws of England* 43, 55 (Brooke 5th ed. 1797)).

Haubert.[31] There, the defendant argued that his right to speedy trial was violated because he was moved between two New York City districts, and then ultimately to the District of Columbia, for his first trial.[32] The Court soundly rejected the defendant's attempt to read more into the right than what was there, explaining that the right involved time, not place.[33] In the words of Justice McKenna, "[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances."[34]

In 1966, in *U.S. v. Ewell*,[35] the Court set forth a threefold policy underlying the right to speedy trial, explaining that the right's objectives were "to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself."[36] A year later, in *Klopfer v. North Carolina*,[37] the Court made the right to speedy trial applicable to the states by incorporating it into the due process guarantee of the Fourteenth Amendment, calling it "one of the most basic rights preserved by our Constitution."[38] Shortly thereafter, in 1971, the Court decided *U.S. v. Marion*,[39] in which it held the right to speedy trial begins when a defendant "becomes an accused" through arrest, indictment, or otherwise.[40] However, the Court provided no guidance regarding what constituted a violation of a defendant's right to speedy trial until 1972, when the prosecution of a brutal murder case compelled it to do so.[41]

Willie Barker was indicted in September 1958 for murdering an elderly Kentucky couple with a tire iron.[42] In October 1963,

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31. *Beavers v. Haubert*, 198 U.S. 77 (1905); Timothy J. Searight, *The Sixth Amendment Right to a Speedy Trial: Applying* Barker v. Wingo *after* United States v. Doggett, 22 W. St. U.L. Rev. 61, 61 (1994–1995).

32. *Beavers*, 198 U.S. at 84–85.

33. *Id.* at 86.

34. *Id.* at 87.

35. *U.S. v. Ewell*, 383 U.S. 116, 120 (1966) (holding "the passage of 19 months between the original arrests and the hearings on the later indictments [does not in] itself demonstrate[ ] a violation of the Sixth Amendment's guarantee of a speedy trial").

36. *Id.*

37. *Klopfer v. N.C.*, 386 U.S. 213 (1967).

38. *Id.* at 222–23, 226.

39. *U.S. v. Marion*, 404 U.S. 307 (1971).

40. *Id.* at 313, 322 (explaining statutes of limitation, not the Sixth Amendment, protect against pre-indictment delay).

41. *Barker v. Wingo*, 407 U.S. 514, 516 (1972) (explaining "in none of these cases have we attempted to set out the criteria by which the speedy trial right is to be judged. This case compels us to make such an attempt.").

42. *Id.* at 516.

after sixteen continuances[43] over a five-year period, Barker was convicted and sentenced to life in prison.[44] Over the next eight years, he appealed his conviction to the Kentucky Court of Appeals (Kentucky's highest state court until 1976), the U.S. District Court for the Western District of Kentucky, and the Court of Appeals for the Sixth Circuit, on grounds that included violation of his right to speedy trial.[45] Each appellate court affirmed the trial court.[46] The U.S. Supreme Court granted certiorari.[47]

In *Barker v. Wingo*,[48] the Supreme Court held that Barker's right to speedy trial had not been violated based on its findings that he was not prejudiced by the delay and indeed did not want a speedy trial.[49] However, the Court first went to great lengths to explain the unique nature of the right to speedy trial, which differs from other constitutional rights of the accused in three important ways.

First, the right to speedy trial protects dual interests that at times conflict. In addition to the defendant's right to "decent and fair procedures," society has numerous interests in minimizing delay between a defendant's arrest and trial to prevent various social and economic harms.[50] These societal interests in ensuring a speedy trial exist "separate from, and at times in opposition to, the interests of the accused."[51]

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43. *Id.* at 517 (explaining "on February 12, 1962, the Commonwealth moved for the twelfth time to continue the case . . . . The Commonwealth was granted further continuances in June 1962 and September 1962 . . . ."); *id.* at 517–18 (referencing two more continuances in February and June 1963, at which point "the court announced that the case would be dismissed for lack of prosecution if it were not tried during the next term").

44. *Id.* at 516, 518.

45. *Id.* at 518.

46. *Id.*; *Barker v. Commonwealth*, 385 S.W.2d 671, 674–75 (Ky. 1964); *Barker v. Wingo*, 442 F.2d 1141, 1143–44 (1971 W.D. Ky.). The U.S. District Court for the Western District of Kentucky rejected Barker's petition for habeas corpus without a hearing. *Barker*, 407 U.S. at 518.

47. *Barker*, 407 U.S. at 519.

48. *Barker v. Wingo*, 407 U.S. 514 (1972).

49. *Id.* at 534, 536.

50. *Id.* at 519–21 (citing several reports and studies identifying negative consequences of pretrial delay, including: (1) manipulation of overcrowded judicial systems by defendants through the plea-bargaining process; (2) accused individuals committing additional crimes while awaiting trial; (3) communities fearing that individuals accused of violent crimes are at large pending their trial; (4) accused individuals jumping bail and escaping punishment; (5) the detrimental effects of delay on rehabilitation efforts; (6) overcrowding and poor conditions in local jails, which can mentally and physically harm prisoners; (7) high costs of keeping accused individuals in jail pending trial; (8) the economy's loss of wages that could have been earned; and (9) costs to society of supporting the "families of incarcerated breadwinners").

51. *Id.* at 519.

The second difference indentified by the Court is that deprivation of the right to speedy trial, unlike other constitutional rights of an accused, "may work to the accused's advantage."[52] While pretrial delay may negatively affect a defendant in some areas of his life, it often simultaneously jeopardizes the prosecution's ability to meet its burden of proof, as memories fade and witnesses disappear.[53] Thus, the Court noted, "deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself."[54]

The third difference, which the Court said may be the most important, is that "the right to speedy trial is a more vague concept than other procedural rights."[55] The Court reiterated its holding from *Beavers* that "any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case."[56] Because the right is so difficult to define, its violation warrants the unusually "severe remedy of dismissal of the indictment."[57]

The Court then turned to setting forth a basic framework for analyzing speedy trial claims. With a touch of foreshadowing, the Court began by noting, "two rigid approaches are urged upon us as ways of eliminating some of the uncertainty which courts experience in protecting the right."[58] The Court "reject[ed] both of the inflexible approaches—the fixed-time period because it goes further than the Constitution requires; [and] the demand-waiver rule because it is insensitive to a right which we have deemed fundamental."[59]

Instead, the Court set forth "a balancing test, in which the conduct of both the prosecution and the defendant are weighed."[60] The Court identified "some of the factors" courts should consider in speedy trial analysis: (1) length of delay; (2) reason for delay; (3) defendant's assertion of the right to a speedy trial; and (4)

52. *Id.* at 521.

53. *Id.*

54. *Barker*, 407 U.S. at 521.

55. *Id.*

56. *Id.* at 522 (citing *Beavers v. Haubert*, 198 U.S. 77, 87 (1905)).

57. *Id.* (contrasting the more serious remedy of dismissal with the less-severe remedies of an exclusionary rule or reversal for a new trial, but explaining that dismissal "is the only possible remedy" for violation of the right to speedy trial).

58. *Id.* at 522–23.

59. *Id.* at 529–30.

60. *Barker*, 407 U.S. at 530.

prejudice to the defendant as a result of the delay.[61] As to the fourth factor, prejudice, the Court explained that it

> should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. . . . (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.[62]

However, the Court noted that no one factor is "necessary or sufficient" to dispose of a speedy trial claim.[63] Instead, "they are related factors and must be considered together with such other circumstances as may be relevant."[64] In addition, each factor's weight depends upon the circumstances of the case.[65]

The Court concluded that, although five years was too long a delay,[66] Barker did not show he was prejudiced by the delay[67] or that he even truly opposed the delay—in fact, the record showed he may have wanted it.[68] Therefore, Willie Barker's right to a speedy trial was not violated.[69] For another two decades, the Court would be largely silent on the right to speedy trial, except to provide straightforward clarification regarding which delays courts can consider as part of a speedy trial claim.[70] Perhaps it helped that two years after *Barker*, Congress passed the Speedy Trial Act of 1974, setting statutory time limits for accomplishing each stage of federal prosecution.[71]

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61. *Id.*

62. *Id.* at 532.

63. *Id.* at 533.

64. *Id.*

65. *Id.* at 530–31.

66. *Barker*, 407 U.S. at 533–34.

67. *Id.* at 534 (stating that "prejudice was minimal" because although "Barker was prejudiced to some extent by living for over four years under a cloud of suspicion and anxiety" and "did spend 10 months in jail before trial," he did not suffer from loss of witnesses or memories at trial).

68. *Id.* at 534–35 ("More important than the absence of serious prejudice, is the fact that Barker did not want a speedy trial.").

69. *Id.* at 536.

70. *See U.S. v. MacDonald*, 456 U.S. 1, 6–7 (1982) (affirming holding of *U.S. v. Marion* that analysis of speedy trial guarantee does not include periods of time prior to arrest and additionally holding it also excludes periods of time after charges are dismissed); *U.S. v. Loud Hawk*, 474 U.S. 302, 310–12, 316–17 (1986) (affirming time constraints of *MacDonald* and additionally holding defendant's speedy trial claim may not include delays attributable to State's meritorious or defendant's frivolous interlocutory appeals).

71. Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–74 (2006) (generally requiring prosecution to bring a defendant to trial within 70 days of indictment, which must be filed within 30 days of arrest or service of summons). The Speedy Trial Act does not apply to juvenile

In 1992, the U.S. Supreme Court returned to the right to speedy trial in *Doggett v. U.S.*[72] Eight years after the federal Drug Enforcement Agency (DEA) indicted Marc Doggett for conspiracy to import and distribute cocaine,[73] federal authorities located and arrested him.[74] After a federal magistrate and district court denied Doggett's motion to dismiss for lack of a speedy trial, Doggett entered a conditional guilty plea and appealed to the Eleventh Circuit Court of Appeals.[75] All Doggett's lower court appeals failed because the courts, applying the four factors set forth in *Barker*, found that Doggett failed to make any affirmative showing under the fourth factor that the delay prejudiced him or his ability to defend against the conspiracy charges.[76]

The U.S. Supreme Court granted certiorari and reversed, holding "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify."[77] It cited to *Barker* for the proposition that "impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.' "[78] Thus, the Court held the Government's eight-and-a-half-year delay in prosecuting Doggett, even though "unaccompanied by particularized trial prejudice," was sufficient to entitle Doggett to relief under his right to speedy trial claim.[79]

After *Doggett*, the Court once again ceased to provide further substantial guidance in interpreting the Sixth Amendment right to speedy trial. As a result, states have been left to grapple with *Barker* and its four factors, which can appear skeletal in comparison to the heft of the right at stake. All fifty state constitutions provide a right to speedy trial independent of the Sixth Amendment.[80] However, in interpreting that right, state courts may not tread upon the basic guarantees of the U.S. Constitution by imposing a narrower state right.[81]

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delinquency proceedings, which are instead subject to the Juvenile Delinquency Act. 18 U.S.C. §§ 5031, 5036 (2006).

72. *Doggett v. U.S.*, 505 U.S. 647 (1992).
73. *Id.* at 648, 650.
74. *Id.* at 650.
75. *Id.* at 650–51.
76. *Id.*
77. *Id.* at 651, 655.
78. *Doggett*, 505 U.S. at 655 (quoting *Barker v. Wingo*, 407 U.S. 514, 532 (1972)).
79. *Id.* at 658–59.
80. *Klopfer v. N.C.*, 386 U.S. 213, 226 (1967).
81. *See id.* at 222.

B. *Montana's Right to Speedy Trial under the Montana Constitution and* City of Billings v. Bruce

The Montana Constitution provides a right to "a speedy public trial" that is independent from that provided in the Sixth Amendment.[82] However, the 1972 Montana Constitutional Convention Bill of Rights Committee understood the provision to be "basically the same" as the Sixth Amendment[83] and voted unanimously to adopt the same sparse wording found in the 1899 Montana Constitution, explaining "it was an admirable statement of the fundamental procedural rights of an accused."[84] In analyzing whether this right was violated, the Montana Supreme Court used "essentially the same factors" articulated in *Barker*, until it decided *City of Billings v. Bruce*[85] in 1998.[86]

In *Bruce*, the Montana Supreme Court worried that the four-factor balancing test of *Barker* was producing "seemingly inconsistent results" nationwide.[87] The Court ultimately retained the four *Barker* factors but clarified them by "incorporat[ing] objective, bright-line criteria into three of them, and . . . modif[ying] the function and importance each factor plays in the overall balancing."[88] The four factors and their interaction within the *Bruce* test are summarized here only briefly, in order to provide a backdrop for the recent developments this note will discuss in part IV.

Under the first factor—length of delay—the *Bruce* Court established that 200 days of delay would trigger speedy trial analysis, regardless of fault for the delay.[89] The overall length of delay would then be considered again later, in allocating the burden of proving prejudice or lack thereof.[90] However, Factor One itself

82. Mont. Const. art. II, § 24.

83. *Montana Constitutional Convention 1971–1972* vol. V, 1776 (Margaret S. Warden et al. eds., Mont. Legis. 1979–1982) (verbatim transcript).

84. *Id.* at vol. II, 640–41 (committee comments) and vol. V, 1776 (verbatim transcript).

85. *City of Billings v. Bruce*, 965 P.2d 866 (Mont. 1998).

86. *State v. Ariegwe*, 167 P.3d 815, 827 (Mont. 2007) (quoting *State v. Sanders*, 516 P.2d 372, 375 (Mont. 1973); citing *Fitzpatrick v. Crist*, 528 P.2d 1322, 1325 (Mont. 1974); *State v. Steward*, 543 P.2d 178, 181 (Mont. 1975) (explaining the Court adopted an early version of the *Barker* factors in 1968 based on *U.S. v. Simmons*, 338 F.2d 804, 807 (2d Cir. 1964))).

87. *Bruce*, 965 P.2d at 871 (citing Brian P. Brooks, *A New Speedy Trial Standard for* Barker v. Wingo*: Reviving a Constitutional Remedy in an Age of Statutes*, 61 U. Chi. L. Rev. 587, 587 (1994)).

88. *Ariegwe*, 167 P.3d at 827.

89. *Bruce*, 965 P.2d at 877.

90. *Id.*

constituted a "threshold criterion" that, once met, was not considered again in the analysis.[91]

Under the second factor—reasons for delay—the *Bruce* Court held courts must assign responsibility for each period of delay, including a specific number of days, to one of the parties.[92] If less than 275 days of delay were attributable to the State, the defendant had the burden of demonstrating that the delay prejudiced him.[93] If 275 or more days of delay were attributable to the State, a rebuttable presumption of prejudice arose, and the State had the burden to overcome it by showing the defendant was not prejudiced.[94] If the State met its burden, the burden shifted to the defendant to show that he was prejudiced by the delay. It was then up to the district court to weigh each party's evidence.[95]

Under the third factor—timely assertion of right—the *Bruce* Court held the defendant merely needed to invoke his right to speedy trial at any time prior to the trial. The defendant could do so "either by demanding a speedy trial or by moving to dismiss for failure to provide a speedy trial."[96] Thus, this factor was merely a simple "yes or no" consideration.

Finally, under the fourth factor—prejudice to the defendant—the *Bruce* Court held it would continue to consider whether the delay prejudiced the defendant through "(1) pretrial incarceration, (2) anxiety and concern, [or] (3) impairment of defense."[97] The Court noted that "the importance of this factor and the degree of prejudice to establish denial of speedy trial will vary based upon other considerations, such as the length of delay and the reason for delay."[98]

In name, the four *Bruce* factors remain largely recognizable in the new right to speedy trial analysis under *Ariegwe*. However, the *Ariegwe* Court realized that, while the existing *Bruce* framework contained most of the necessary pieces, the analysis failed to truly reflect the balancing act envisioned by the United States Supreme Court. It further decided that the analysis needed a heavy dose of clarification in order for practitioners and courts to apply it consistently.

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91. *Ariegwe*, 167 P.3d at 828.
92. *Bruce*, 965 P.2d at 877.
93. *Id.* at 877–78.
94. *Id.* at 877.
95. *Id.*
96. *Id.* at 878.
97. *Id.* at 878–79.
98. *Bruce*, 965 P.2d at 878.

IV. *STATE v. ARIEGWE* PART ONE: RESTORING THE BALANCING TEST

A. *The Montana Supreme Court's Reassessment of* Bruce

After reviewing the federal *Barker* test[99] and Montana's *Bruce* test,[100] the Court announced it would "take this opportunity to revisit the process by which speedy trial claims are to be analyzed by the courts of this State and to revise [its] analytical framework in several significant respects."[101] The Court began by noting that, although it previously characterized its speedy trial analysis as a balancing test, it was closer to a "four-step analytical progression" that "channel[ed] the focus of the analysis to the issue of prejudice" while making the first three factors less significant.[102] Thus, the Court decided it had strayed from the balancing test envisioned by the U.S. Supreme Court and stated it now believes "an actual balancing of all four factors is preferred and, in fact, is more likely to produce an accurate assessment of a speedy trial claim than is an approach under which three of the factors function, essentially, as mere preludes to the fourth."[103]

The Court also rejected Ariegwe's argument that if the State caused at least 275 days of delay and failed to rebut the presumption of prejudice, Ariegwe had no burden to present any proof of prejudice.[104] The Court decided that this reasoning, while consistent with its previous holdings, was no longer appropriate: "presuming prejudice based on nothing more than the State's failure to prove the contrary is not, in our view, an accurate basis on which to evaluate a speedy trial claim."[105] Finally, the Court rejected its previous holding in *Bruce* that further analysis of Factor Three (timely assertion of right) was unnecessary if the defendant had timely asserted his right to speedy trial.[106]

The Court then unveiled its "revised speedy trial test," along with "several important rules" for its application.[107] More accurately, it painstakingly elucidated a detailed speedy trial analysis

99. *State v. Ariegwe*, 167 P.3d 815, 826–27 (Mont. 2007) (citing *Barker v. Wingo*, 407 U.S. 514 (1972)); *see supra* nn. 45–73.

100. *Ariegwe*, 167 P.3d at 827–28 (citing *Bruce*, 965 P.2d 866); *see supra* nn. 92–104.

101. *Ariegwe*, 167 P.3d at 829.

102. *Id.* at 828.

103. *Id.* at 829.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Ariegwe*, 167 P.3d at 826.

over the course of almost twenty pages.[108] A summary of the test spanned another three pages, followed by a two-page outline provided "[f]or the convenience of the bench and bar."[109] Although the Court's opinion was unanimous, four justices specially concurred to "bemoan the law's complexity."[110]

B. The Revised Speedy Trial Test under Ariegwe

The Montana Supreme Court reaffirmed that *Barker*'s four-factor balancing approach is "the correct and most complete standard available to judge speedy trial questions."[111] However, it noted that its revised test is grounded in Article II, section 24 of the Montana Constitution, independent of the U.S. Constitution.[112] Thus the Court announced it would "give [its] own meaning" to the *Barker* factors, as follows.[113]

1. New Factor One: Length of Delay

The Court clarified that establishing a presumptively prejudicial delay must be a two-part inquiry. Trial courts must twice address the length of the delay: "first, as a threshold matter and then, if the speedy trial test has been triggered, as a factor to be weighed in the overall balancing."[114]

As to length of delay as a threshold, the Court reaffirmed the 200-day threshold for triggering speedy trial analysis.[115] It added that "the speedy trial clock begins to run at the earliest of" formal accusation (by arrest, complaint, indictment or information) and ends at the date of trial or entry of a guilty plea.[116]

As to consideration of the length of delay as a factor in the overall balancing, the Montana Supreme Court adopted the U.S. Supreme Court's rule that once the threshold is met and the presumption of prejudice arises, "the court must then consider, as one factor among several, the extent to which the delay stretches be-

108. *Id.* at 829–47.
109. *Id.* at 847–50.
110. *Id.* at 864 (Rice, Morris, Leaphart & Warner, JJ., specially concurring).
111. *Id.* (quoting *State v. Tiedemann*, 584 P.2d 1284, 1287 (Mont. 1978)) (internal quotations omitted).
112. *Id.* at 829.
113. *Ariegwe*, 167 P.3d at 830.
114. *Id.*
115. *Id.* at 831.
116. *Id.*

yond the [trigger date]."[117] The Court rejected its previous 275-day bright-line rule from *Bruce* for determining who bears the burden of showing prejudice or lack thereof, explaining that "*Barker*'s reference to 'presumptively prejudicial' delay was not meant to place the burden of proof . . . entirely on the State or to mandate a finding of prejudice absent evidence to the contrary."[118]

Instead, the Court adopted the U.S. Supreme Court's "intensifying presumption of prejudice."[119] Under this measure, the longer the delay suffered by a defendant, the lower the quantum of proof the defendant need show and the higher the quantum of proof the State must show under Factor Four (prejudice to defendant).[120] Thus, the presumption of prejudice will not necessarily relieve a defendant of showing evidence of prejudice, but rather indicates the "quantum of evidence" required of each party.[121] In addition, prejudice need not be presumed merely because the State fails to present sufficient evidence to the contrary, because to do so could provide a defendant with "an undeserved windfall."[122] Finally, the Court noted that the length of the delay also bears on Factor Two: the longer the delay, the greater the State's burden to show "valid justifications," and the "more compelling the State's justifications for the delay must be."[123]

2. *New Factor Two: Reasons for Delay*

The Court reiterated that, under the second factor of its revised speedy trial analysis, a district court must 1) identify each period of delay; 2) determine who was responsible for it; and 3) assign weight to it based on the cause and motive.[124] With regard to determining how heavily a delay should be weighted against a party, the Court provided examples from *Barker* indicating a spectrum of responsibility:

> A *deliberate* attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as *negligence* or *overcrowded courts* should be weighted less heavily but nevertheless should be considered since

117. *Id.* (quoting *Doggett v. U.S.*, 505 U.S. 647, 651–52 (1992)) (internal quotations omitted).
118. *Id.* at 833.
119. *Ariegwe*, 167 P.3d at 831–33 (citing *Doggett*, 505 U.S. at 652).
120. *Id.* at 833.
121. *Id.*
122. *Id.*
123. *Id.* at 835–36.
124. *Id.* at 836–37.

> the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, *a valid reason*, such as a missing witness, should serve to justify appropriate delay.[125]

The Court held that the function of this factor "is no longer 'to conclusively establish a burden shift for the determination of prejudice,' " but to determine "the specific cause and culpability for each period of delay."[126] The Court explained:

> Obviously, the more delay in bringing the accused to trial that is due to lack of diligence or other "unacceptable" reasons, the more likely the accused's speedy trial right has been violated. Likewise, the more delay caused by the accused for "unacceptable" reasons, the less likely the right has been violated.[127]

The final consideration under this factor recognizes that courts and prosecutors bear "the primary burden" of bringing cases to trial.[128] Thus, as the Court noted in its analysis of the first factor,[129] the longer a delay lasts "beyond the 200-day trigger date, the more compelling the State's justifications for the delay must be."[130]

3. New Factor Three: "Mere Assertion of Right" Becomes "Defendant's Responses to the Delay"

The Court retained its holding that there is no "magical time" for a defendant to assert his right to speedy trial.[131] However, the Court went on to hold that it will no longer end its analysis there, because "the overall accuracy of the balancing test is enhanced when the totality of the accused's responses to pretrial delays is considered."[132] Thus, a "court must evaluate the accused's responses to the delay—i.e., his or her acquiescence in and objections to pretrial delays."[133] These responses must be evaluated based on surrounding circumstances, including "the timeliness, persistence, and sincerity of the objections, the reasons for the acquiescence, whether the accused was represented by counsel, the

125. *Ariegwe*, 167 P.3d at 837 (quoting *Barker v. Wingo*, 407 U.S. 514, 531 (1972) (emphasis added, footnote omitted)).

126. *Id.* at 839 (overruling and quoting *State v. Haser*, 20 P.3d 100, 105 (Mont. 2001)).

127. *Id.*

128. *Id.* (quoting *Barker*, 407 U.S. at 529) (internal citations omitted).

129. *Id.* at 835–36; *supra* n. 48 and accompanying text.

130. *Id.* at 836, 839.

131. *Ariegwe*, 167 P.3d at 839.

132. *Id.*

133. *Id.* at 840.

accused's pretrial conduct . . . and so forth."[134] In addition, the district court may not infer that a defendant did not want a speedy trial or waived his right to one solely because the defendant did not object to pretrial delay.[135]

4. New Factor Four: Prejudice to Defendant

The *Ariegwe* Court reaffirmed that the right to speedy trial is intended to protect the three fundamental interests set forth in *Barker*.[136] The Court noted that "[t]he first interest—preventing oppressive pretrial incarceration—reflects the 'core concern' of the speedy trial guarantee: 'impairment of liberty.' "[137] The Court held that this inquiry requires courts to consider all circumstances surrounding the defendant's incarceration, especially its duration.[138] For example, when examining the duration of the incarceration, the court must consider whether and how the duration was affected by the complexity of the charges or the defendant's own misconduct, such as a propensity to flee.[139] The Court also held that "the conditions of the incarceration are relevant in assessing oppressiveness."[140]

The Court explained that the focus of the second interest, minimizing the defendant's anxiety and concern, is "on the ways in which the presence of unresolved criminal charges has disrupted the accused's life."[141] However, the Court was careful to distinguish that some anxiety and disruption are inherent in facing criminal charges; thus, the question is whether the anxiety and disruption were due to delay and not the charges themselves.[142]

Finally, the Court emphasized that the third interest, impairment to the accused's defense, is the most serious because it "skews the fairness of the entire system."[143] However, the Court noted that, while this concern may carry more weight than the

134. *Id.* at 841.
135. *Id.* at 841–42.
136. *Id.* at 842 (citing *Barker v. Wingo*, 407 U.S. 514, 532 (1972); *Doggett v. U.S.*, 505 U.S. 647, 654 (1992)).
137. *Ariegwe*, 167 P.3d at 843 (quoting *U.S. v. Loud Hawk*, 474 U.S. 302, 312 (1986)).
138. *Id.*
139. *Id.*
140. *Id.* at 844.
141. *Id.* at 845.
142. *Id.*
143. *Ariegwe*, 167 P.3d at 845 (quoting *Barker v. Wingo*, 407 U.S. 514, 532 (1972)) (internal quotations omitted).

first two, it "is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony can rarely be shown."[144] Therefore, the defendant need not show "affirmative proof of particularized prejudice."[145] However, absent such affirmative proof, the Court explained that courts must assess impairment based upon other factors such as the length of delay, the defendant's responses, and the duration of pretrial incarceration.[146]

5. Balancing the Four Factors

Having clarified each factor, the *Ariegwe* Court reaffirmed its position that, as the U.S. Supreme Court stated in *Barker*, the four factors stated above must be balanced, and none is dispositive.[147] They must all be considered together with any other relevant circumstances.[148] No one factor has the most significant weight, and a factor's relative "significance will vary from case to case."[149]

6. Summary and Outline

After setting forth the revised right to speedy trial test, the Court reiterated that its purpose was to "revis[e] our framework for analyzing speedy trial claims so that it more closely tracks the balancing approach envisioned by the U.S. Supreme Court in *Barker*, *Doggett*, and other post-*Barker* cases."[150] It then provided a three-page summary of the four factors and the balancing test it had just set forth.[151] Following its summary, the Court also provided, "for the convenience of the bench and bar," a two-page outline of its revised test.[152]

C. Timing of Speedy Trial Motion and Ruling by Court

Finally, the Court succinctly addressed two procedural matters relating to application of the speedy trial analysis. First, it

144. *Id.* at 846 (quoting *Doggett v. U.S.*, 505 U.S. 647, 655 (1992)).
145. *Id.* (quoting *Doggett*, 505 U.S. at 655) (internal quotations omitted).
146. *Id.*
147. *Id.* at 846–47.
148. *Id.* at 847.
149. *Ariegwe*, 167 P.3d at 847.
150. *Id.*
151. *Id.* at 847–49.
152. *Id.* at 849–50.

revised its previous rule from *Bruce* that required speedy trial motions to be filed at least ten days before trial, or any resulting delay would be assigned to the defendant.[153] It modified the rule to require that

> any delay directly attributable to the filing of a speedy trial motion less than *thirty* days prior to the scheduled trial date should be charged to the accused. Conversely, any delay directly attributable to the filing of such a motion *thirty or more* days prior to the scheduled trial date should be charged to the State (as institutional delay).[154]

Second, the Court reaffirmed its previous requirement that "once a motion to dismiss for denial of speedy trial has been made, . . . it [must] be ruled upon by the district court before commencement of trial."[155] However, it added that "the court must . . . enter findings of fact and conclusions of law with respect to each of the four factors *and* how the four factors were balanced against each other."[156]

V. *State v. Ariegwe* Part Two: The Court's Application of Its New Balancing Test to Ariegwe's Speedy Trial Claim

Once the Court set forth its revised speedy analysis test, it could have vacated the district court's judgment and remanded Ariegwe's claim for reconsideration using the new parameters. Instead, the Court proceeded to use the factual record before it to apply the revised speedy trial test to Ariegwe's claims, explaining it would be helpful to illustrate the analysis for courts and litigants.[157]

A. Applying the Four Factors

1. Application of Factor One: Length of Delay

In considering the first factor, the Court found the trial delay in Ariegwe's case was 408 days (over twice the amount required to trigger speedy trial analysis).[158] Therefore, the State was required to provide "particularly compelling justification for the de-

153. *Id.* at 850–51 (citing *City of Billings v. Bruce*, 965 P.2d 866, 878 (Mont. 1998)).
154. *Id.* at 851.
155. *Ariegwe*, 167 P.3d at 851 (quoting *Bruce*, 965 P.2d at 878) (internal quotations omitted).
156. *Id.*
157. *Id.* at 851–52.
158. *Id.* at 852.

lay under Factor Two" and "make a highly persuasive showing that Ariegwe was not prejudiced by the delay" under Factor Four.[159] At the same time, "the quantum of proof" the Court would expect of Ariegwe under Factor Four would be "correspondingly lower."[160]

2. Application of Factor Two: Reasons for Delay

Under Factor Two, the Court identified and reviewed each period of delay and the circumstances of and reason for each delay. It concluded that of the 408 days of delay, 241 days were attributable to the State as institutional delay, 42 days to the State due to lack of diligence, and 105 days to the State due to understaffing and lack of diligence, for a total of 388 days of delay attributable to the State.[161] The remaining 20 days were charged to Ariegwe.[162] The Court noted that "95% of the delay in this case is attributable to the State" and concluded that Factor Two weighed in favor of Ariegwe.[163]

3. Application of Factor Three: Defendant's Responses to the Delay

The Court proceeded with a full analysis of Ariegwe's claim under the new Factor Three analysis, focusing on Ariegwe's responses to the delays.[164] However, it stated it would give little weight to this factor in Ariegwe's case because Ariegwe had proceeded under the previous rule from *Bruce*, which required only that a defendant assert his right to speedy trial at some time before trial.[165] The Court noted that Ariegwe filed a motion to dismiss thirty-five days before trial but found that "as a general rule the mere fact that the accused filed a motion to dismiss on speedy trial grounds sometime prior to the commencement of trial is itself of little probative value on the question of whether the right has been violated."[166] The Court also noted that, while Ariegwe waited until long past the 200-day trigger date to assert his right, he had also requested several discoverable items from the State

159. *Id.*
160. *Id.*
161. *Ariegwe*, 167 P.3d at 852–54.
162. *Id.* at 854.
163. *Id.*
164. *Id.* at 854–55.
165. *Id.* at 855.
166. *Id.*

that had not been provided.[167] This suggested that, overall, Ariegwe had wanted to move the case along.[168] Thus, the Court concluded that, although it would give Factor Three "little weight in the overall balancing," the factor weighed slightly in Ariegwe's favor.[169]

4. Application of Factor Four: Prejudice to Defendant

Finally, under Factor Four the Court considered whether the delay in bringing Ariegwe to trial caused prejudice to him. The Court explained:

> [W]hile both parties should come forward with evidence on the question of prejudice, the court must weigh each party's evidence (or lack thereof) in light of [the] intensifying presumption. Specifically, as the delay gets longer, the necessary showing by the accused of particularized prejudice decreases while the necessary showing by the State of no prejudice simultaneously increases.[170]

The Court had already determined under Factor One that the State had to "make a highly persuasive showing . . . while the quantum of proof . . . expected of Ariegwe under this factor is correspondingly lower."[171] The Court considered each of the interests the speedy trial right was intended to preserve: "preventing oppressive pretrial incarceration, minimizing anxiety and concern caused by the presence of unresolved criminal charges, and limiting the possibility that the accused's ability to present an effective defense will be impaired."[172]

Ariegwe conceded that his four-day incarceration prior to trial was not oppressive and failed to show how his ability to present an effective defense was impaired in any specific way (although he argued some impairment "must be presumed given the length of the delay").[173] Thus, Ariegwe focused on showing specific instances of anxiety and concern caused to him by the delay.[174] The State argued that any suffering experienced by Ariegwe was caused by the charges and his own decisions, not the delay.[175]

167. *Ariegwe*, 167 P.3d at 855.
168. *Id.* at 855–56.
169. *Id.* at 856.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Ariegwe*, 167 P.3d at 856.
174. *Id.* at 856–57.
175. *Id.* at 857.

The Court stated, "the question here is whether the delay in bringing Ariegwe to trial unduly prolonged the disruption or aggravated the anxiety and concern that are inherent in being accused of a crime."[176] The Court agreed with the district court that it is thus necessary to apportion anxiety and concern between the charge itself and the delay.[177] It also agreed with the district court that Ariegwe was required to make some showing of particularized or demonstrable prejudice, which he failed to do.[178] Finally, the Court refused to consider evidence of anxiety and concern suffered by Ariegwe's family except to the extent it affected Ariegwe.[179]

The Court concluded the State "made the required highly persuasive showing that Ariegwe was not prejudiced by the delay."[180] There was no oppressive pretrial incarceration; the State showed "Ariegwe's ability to present an effective defense had not been demonstrably impaired"; and " 'the primary source' of Ariegwe's anxiety and concern was the nature of the charged offenses."[181] Thus, this factor weighed in favor of the State.

B. The Balancing Test

Turning to the balancing portion of its analysis of Ariegwe's speedy trial claim, the Court explained that "[a] court assessing a speedy trial claim must balance the four factors based on the facts of the particular case and the weights assigned to each factor."[182] The Court found that Factors One, Two, and Three weighed in Ariegwe's favor, while Factor Four weighed in the State's favor.[183] However, as the Court had warned earlier, it gave little weight to Ariegwe's responses to the delay under Factor Three and concluded that the "State's highly persuasive showing of no prejudice (Factor Four)" outweighed the other factors that were in Ariegwe's favor.[184] Therefore, it held, the trial delay did not violate Ariegwe's constitutional right to a speedy trial.

176. *Id.*
177. *Id.* at 857–58.
178. *Id.* at 858.
179. *Ariegwe*, 167 P.3d at 857.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 858–59.
184. *Id.* at 859.

VI. ANALYSIS

Ariegwe's revised speedy trial analysis primarily presents problems at three levels. First, several general criticisms are warranted, in light of how the test has historically been applied and was meant to be applied. Second, a careful examination of each of the revised factors and their application reveals significant discrepancies between federal jurisprudence and the Montana Supreme Court's opinion. Finally, it is possible that *Ariegwe* restricts the right to speedy trial beyond that contemplated by the Sixth Amendment, which would render it unconstitutional. The analysis concludes with a brief discussion of the Montana Supreme Court's treatment of speedy trial claims post-*Ariegwe* and guidance for practitioners applying *Ariegwe*'s analysis.

While the Montana Supreme Court stated it was grounding its speedy trial analysis in the Montana Constitution's right to speedy trial,[185] it nonetheless proceeded to overhaul the analysis with an eye toward the U.S. Supreme Court's interpretation of the Sixth Amendment under *Barker*, emphasizing that "*Barker*'s balancing approach is 'the correct and most complete standard available to judge speedy trial questions.' "[186] Moreover, the Montana Supreme Court previously "incorporated the Supreme Court's clarification of the four factors into [the] existing analytical framework."[187] Given that the Montana Supreme Court originally adopted *Barker*'s four factors into Montana case law, and because the *Ariegwe* Court apparently hoped to better conform Montana law to the spirit of *Barker* and the balancing test found there, it is appropriate to consider whether the Court succeeded in that goal.

As a starting point, a visual comparison of the two tests illustrates the formidable gulf between *Barker*'s simple four-factor analysis and the *Ariegwe* Court's newly defined speedy trial analysis. Under *Barker*, courts are to use a balancing test that considers all relevant factors, including but not limited to:

I. Length of delay;
II. Reason for the delay;
III. The defendant's assertion of his right; and
IV. Prejudice to the defendant, considering the interests the right is designed to protect:
    A. Prevent oppressive pretrial incarceration;
    B. Minimize anxiety and concern of the accused; and

185. *Ariegwe*, 167 P.3d at 829–30.
186. *Id.* at 829 (quoting *State v. Tiedemann*, 584 P.2d 1284, 1287 (Mont. 1978)).
187. *Id.* at 827 (citations omitted).

C. Limit the possibility that the defense will be impaired.[188]

Under *Ariegwe*, courts are to similarly use a balancing test that considers all relevant factors, as follows:

I. Factor One: The Length of the Delay
   A. Is the delay long enough to trigger the four-factor balancing test?
      1. When did the defendant become an accused?
      2. When is the defendant's trial date?
      3. Is the interval between accusation and trial at least 200 days?
   B. To what extent does the delay stretch beyond the trigger date?
      1. The presumption that pretrial delay has prejudiced the accused intensifies over time; thus, as the delay gets longer, the quantum of proof that may be expected of the accused under Factor Four decreases, while the quantum of proof that may be expected of the State under Factor Four simultaneously increases.
      2. The State's burden under Factor Two to justify the delay likewise increases with the length of the delay; thus, the further the delay stretches beyond the 200-day trigger date, the more compelling the State's justifications under Factor Two must be.

II. Factor Two: The Reasons for the Delay
   A. Identify each period of delay in bringing the accused to trial.
   B. Attribute each period of delay to the appropriate party;
      1. The prosecution bears the burden of explaining the pretrial delays.
      2. Any delay not demonstrated to have been caused by the accused or affirmatively waived by the accused is attributed to the State by default.
   C. Assign weight to each period of delay based on the specific cause and culpability for the delay.
      1. Bad-faith delay, such as a deliberate attempt to gain a tactical advantage or to avoid trial, weighs heavily against the party that caused it.
      2. Negligence or lack of diligence in bringing the accused to trial occupies the middle ground on the culpability scale. It is weighed more lightly against the State than a deliberate attempt to hamper the defense, but it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun.
      3. Delay inherent in the criminal justice system and caused by circumstances largely beyond the control of the prosecutor and the accused is "institutional delay,"

188. *Barker v. Wingo*, 407 U.S. 514, 530–32 (1972).

which is attributed to the State but weighs less heavily against the State than bad-faith delay and lack of diligence.

4. Delay for "valid" reasons, such as a missing witness or a particularly complex charged offense, is weighed least heavily of all the types of delay.

III. Factor Three: The Accused's Responses to the Delay
   A. Evaluate the accused's responses to the delay—i.e., his or her acquiescence in and objections to pretrial delays—in light of the surrounding circumstances. Some considerations:
      1. The timeliness, persistence, and sincerity of the objections
      2. The reasons for the acquiescence
      3. Whether the accused was represented by counsel
      4. The accused's pretrial conduct (as that conduct bears on the speedy trial right)
   B. The totality of the accused's various responses to the delays in bringing him or her to trial is indicative of whether he or she actually wanted a speedy trial, which in turn informs the inquiry into whether there has been a deprivation of the right.
   C. The totality of the accused's various responses to the delays also serves as a gauge of the weights the court should assign to the other three factors in the balancing.

IV. Factor Four: Prejudice to the Accused
   A. Was the pretrial incarceration oppressive, given the circumstances of that incarceration? Some considerations:
      1. Duration of the incarceration
      2. The complexity of the charged offense(s)
      3. Any misconduct on the part of the accused directly related to the pretrial incarceration
      4. The conditions of the incarceration
   B. Has the delay in bringing the accused to trial unduly prolonged the disruption of his or her life caused by the presence of unresolved criminal charges or aggravated the anxiety and concern that are inherent in being accused of a crime? Some considerations:
      1. Public scorn or obloquy; damage to reputation in the community
      2. Deprivation of employment
      3. Drain of financial resources or economic hardship
      4. Curtailment of associations
   C. Has the accused's ability to present an effective defense been impaired by the delay? Some considerations:
      1. The availability of witnesses and their ability to recall accurately events related to the charged offense(s)
      2. The accused's ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence

3. The length of the delay (excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify)
4. The accused's responses to the delay (the more imperiled the accused's ability to present an effective defense becomes, the more likely he or she is to complain about the delay)
5. The duration of the pretrial incarceration (an accused who is locked up is hindered in his or her ability to gather evidence, contact witnesses, or otherwise prepare his or her defense)[189]

Ariegwe's revised speedy trial analysis is obviously lengthier and more detailed than that set forth by the U.S. Supreme Court under *Barker*. However, given the amorphous and fluid nature of the right to speedy trial, does it accurately reflect the concerns of that fundamental right?

A. Generally Speaking: Why Less Was More

Aside from the substantive changes the Montana Supreme Court made under the specific factors of its speedy trial analysis, discussed below in part VI.B, several problems arise simply from the Court's creation of the new test. First, the reasoning behind the creation of the new speedy trial test is itself suspect. The *Ariegwe* Court contended that "the four-factor balancing test had, unfortunately, led to 'seemingly inconsistent results' nationwide."[190] If *Barker*'s application rendered different results for similarly-situated defendants, the Court would have been justified in creating a sweeping change in the framework for speedy trial rights under the Sixth Amendment and Article II, section 24 of the Montana Constitution.

However, the claim that *Barker*'s test led to "inconsistent *results*" is not supported by any authority.[191] This statement, which predicated and justified the Court's reconstruction of the speedy trial test under *Barker*, *Doggett*, the Sixth Amendment, and Article II, section 24 of the Montana Constitution, is an incorrect interpretation of the single law review article cited and numerous Montana cases. Rather, "courts have not applied a *consistent legal standard* in speedy trial cases."[192] The problem, if one existed,

189. *Ariegwe*, 167 P.3d at 849–50.

190. *Id.* at 827 (quoting *City of Billings v. Bruce*, 965 P.2d 866, 871, 871–76 (Mont. 1998) ("identifying varied and inconsistent applications of the test in [Montana's] own caselaw")).

191. *Id.* (emphasis added).

192. Brooks, *supra* n. 87, at 587 (emphasis added).

was not in *Barker*'s results, but rather in federal trial courts' different constructions of the *Barker* framework. The Montana speedy trial jurisprudence cited in *Bruce* supports such a proposition.[193] Moreover, the U.S. Supreme Court cautioned courts applying *Barker*'s factors that it was merely "identify[ing] *some* of the factors which courts should assess in determining whether a particular defendant has been deprived of his right."[194] The Court suggested that the factors would be constructed or interpreted differently and yet withstand constitutional scrutiny. Therefore, the "problem" identified in *Bruce* and *Ariegwe* was not constitutional in nature, and the "inconsistent results" argument offered by the Montana Supreme Court to justify overhauling Bruce actually provided little or no justification.

Perhaps even more problematic for Montana courts and practitioners, the compartmentalized "checklist" of questions to answer in conducting a speedy trial analysis skews the fluidity of the *Barker* test from the outset. The speedy trial inquiry is necessarily fluid because courts must balance a number of factors, no one of which is dispositive.[195] *Barker* and *Doggett* provided a very simple weighing and balancing framework: has the speedy trial inquiry been triggered (prejudice is presumed to intensify as the delay exceeds the triggering date); why has the delay occurred, or who is to blame for the delay; has the defendant objected to the delay; and has the defendant been prejudiced as a result?[196]

At first glance, the *Ariegwe* test appears similar to the federal speedy trial right framework, at least with regard to *Barker*'s four factors. However, upon closer examination, *Ariegwe* has expanded *Barker*'s four factors into an unworkable, redundant, and time-consuming examination of a defendant's speedy trial right. In considering the speedy trial right, the Montana Supreme Court failed to heed the warning of the old adage: history repeats itself. The Court, in explaining why it felt compelled to rework the speedy trial analysis from *Bruce*, stated:

> Although [the *Bruce*] modifications to our speedy trial test resulted in a more structured analytical approach, we recognize, for the reasons which follow, that our method of analysis has strayed considerably from the actual balancing approach envisioned in *Barker* . . . .[197]

193. *Bruce*, 965 P.2d at 871–76.
194. *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (emphasis added).
195. *Id.* at 533.
196. *Id.* at 530–33; *Doggett v. U.S.*, 505 U.S. 647, 651 (1992).
197. *State v. Ariegwe*, 167 P.3d 815, 828 (Mont. 2007).

After acknowledging that *Bruce* "strayed considerably" from *Barker*, the Montana Supreme Court expounded the *Barker* factors to include myriad analytical requirements not envisioned in the federal speedy trial right framework. The Court ended up creating an even more structured analytical approach that threatens to devour the balancing test envisioned by *Barker*.

A rigid framework for analyzing speedy trial rights is counter-intuitive to the U.S. Supreme Court's description of the speedy trial right as "amorphous" and "slippery."[198] The Montana Supreme Court took twenty-one pages to set forth a right-to-speedy-trial analysis that took the United States Supreme Court a few paragraphs.[199] In doing so, the Montana Supreme Court has indeed created the "mother of all balancing tests"[200] as well as fulfilled the omen articulated in *Doggett* that over-examination of *Barker*'s factors would obscure the purpose and intent of the speedy trial right.[201]

B. A Closer Look at "the Mother of All Balancing Tests"

In *Ariegwe*, the Montana Supreme Court expressed that it was attempting a second time to bring Montana's right to speedy trial analysis into line with what the U.S. Supreme Court envisioned in *Barker*. Indeed, the *Ariegwe* Court altered numerous aspects of Montana's former speedy trial analysis under *Bruce*, which had likewise been an inaccurate interpretation of *Barker*. However, a factor-by-factor comparison of *Barker*'s test and *Ariegwe*'s revised test indicates that the Court still has not achieved *Barker*'s vision or its aims.

1. The Length of Delay and the "Quantum of Proof"

The Montana Supreme Court unnecessarily obfuscated *Barker*'s first factor—the length of delay—by requiring an evidentiary "quantum of proof" analysis and a determination of the extent of delay beyond the trigger date "*irrespective of fault for the delay*."[202] In addition, the Court set a "presumptively prejudicial"

198. *Barker*, 407 U.S. at 522; *see also* Brooks, *supra* n. 87, at 587 (describing the right to speedy trial as "amorphous, slippery, and generally difficult to vindicate") (citations omitted).

199. *Ariegwe*, 167 P.3d at 829–50; *Barker*, 407 U.S. at 530–32.

200. *Ariegwe*, 167 P.3d at 864 (Rice, Morris, Leaphart & Warner, JJ., specially concurring).

201. *Doggett*, 505 U.S. at 669 (Thomas, Scalia, JJ., & Rehnquist, C.J., dissenting).

202. *Ariegwe*, 167 P.3d at 833, 836 (emphasis added).

triggering date for speedy trial analysis which, although not incorrect under *Barker*, demands an earlier speedy trial analysis than the majority of other jurisdictions.[203] Together, these requirements will lead to confusion and increased demands on the time and resources of courts already overburdened by crowded dockets.[204]

The *Ariegwe* Court reaffirmed its 200-day threshold as the minimum length of delay necessary before a defendant can claim a violation of his right to a speedy trial.[205] Interestingly, the U.S. Supreme Court noted in *Doggett* that "lower courts have generally found post-accusation delay 'presumptively prejudicial' at least as it approaches *one year*."[206] Additionally, commentators have observed that, "[w]hile some courts still follow the eight-month mark or even something shorter, most have settled on a somewhat longer period, such as nine months or, more commonly, a time 'approaching,' at, or slightly (or even more than slightly) beyond one year."[207] Comparatively, two hundred days—or roughly six and a half months—represents a dramatically shorter timeframe in which the State must prosecute a criminal defendant or answer to a constitutional speedy trial challenge. Montana, like many states, already struggles to meet the demands on its resources, including increasing demands on judicial funding and resources.[208] *Ariegwe* has added to that burden by triggering the speedy trial analysis after only 200 days have elapsed.[209]

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203. *Id.* at 830–31.

204. Karla M. Gray, *2007 State of the Judiciary Address*, 60th Leg., Jt. Sess., 5–6, 8 (Jan. 18, 2007) (transcript available at http://www.montanacourts.org/state_judiciary/2007.pdf) (describing the state of the judiciary in Montana as "dogged . . . with large inequities in employee pay," lacking in funding, constrained by time and "heavy caseloads," and having "substantial need for additional resources." Additionally, Chief Justice Gray implored the legislature to "be mindful . . . that imposing stricter, and *shorter*, and additional, timelines may result in expectations and requirements of District Courts that simply cannot humanly be met." (emphasis added)).

205. *Ariegwe*, 167 P.3d at 831.

206. *Doggett*, 505 U.S. at 652 n. 1 (emphasis added) (citing Wayne R. LaFave & Jarold H. Israel, *Criminal Procedure* vol. 2, § 18.2, 405 (3d ed., West 1984); Gregory Joseph, *Speedy Trial Rights in Application*, 48 Fordham L. Rev. 611, 623 n. 71 (1980)).

207. Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, Criminal Procedure vol. 5, § 18.2(b), 119 (3d ed., West 2007) (citations omitted).

208. Gray, *supra* n. 204.

209. Some states have prescribed shorter speedy trial rules that are statutory rather than constitutional. For example, Washington Superior Court Criminal Procedure Rule 3.3 requires the defendant be brought to trial within 60 days if incarcerated and 90 days if not incarcerated. Wash. R. Crim. P. 3.3(b). However, the rule "is not a constitutional mandate." *State v. Campbell*, 691 P.2d 929, 938 (Wash. 1984) (citing *Barker v. Wingo*, 407 U.S.

More importantly, neither *Barker* nor its progeny compelled an evidentiary burden or "quantum of proof" analysis under the length of delay factor. Such an analysis misapprehends a deceptively easy concept articulated in *Doggett* and unnecessarily confuses the analysis. The U.S. Supreme Court defined the presumption of prejudice to the defendant as "intensify[ing] over time" but left the analysis to be "discuss[ed] below"[210] under the other factors. The Court provided a simple example to illustrate this "intensifying presumption" in favor of the defendant: while the State's negligence in prosecuting a defendant might be initially tolerable, eventually courts must presume the delay has prejudiced the defendant and his defense in ways he cannot prove.[211] Thus, negligence in delay may "intensify" over time from tolerable to prejudicial. The analysis bears no consideration of the "quantum" of evidence needed to defeat an "intensifying presumption" but is merely concerned with the length of the delay, who is responsible, the reasons for the delay, and the prejudice to the defendant.

The intensifying presumption of prejudice likewise cannot be viewed in isolation, but must be considered with the other factors. The *Ariegwe* Court instructed lower courts to "consider the extent to which the delay (. . . *irrespective of fault for the delay*) stretches beyond the 200-day trigger date [because] the presumption that pretrial delay has prejudiced the accused intensifies over time."[212] There is no sound reason to consider the extent of the delay alone, determine a presumption of prejudice, and then examine the causes of the delay. *Barker* and its progeny instructed courts to determine who is responsible for the delay in conjunction with the length of the delay and attach a presumption of prejudice accordingly, if warranted. Indeed, the *Barker* Court analyzed the length of delay factor as "[c]losely related to . . . the reason the government assigns to justify the delay."[213] These interrelated considerations cannot be separated and examined individually, as *Ariegwe* now seems to compel.

514, 523 (1972) (explaining there is "no constitutional basis for holding that the speedy trial right can be qualified into a specified number of days or months")).

210. *Doggett*, 505 U.S. at 652.

211. *Id.* at 657 (stating "the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness . . . and its consequent threat to the fairness of the accused's trial." (citations omitted)).

212. *State v. Ariegwe*, 167 P.3d 815, 836 (Mont. 2007) (emphasis added).

213. *Barker*, 407 U.S. at 531.

A simple hypothetical illustrates the awkwardness of this analysis. A defendant who repeatedly delays his pending trial and far exceeds the speedy trial triggering date cannot then complain that his speedy trial right has been violated. Thus, there can be no presumption of prejudice to the defendant. However, a court applying *Ariegwe* would nonetheless undergo a lengthy analysis examining how much time has elapsed beyond the 200-day triggering date, attribute a presumption of prejudice in favor of the defendant, and speculate as to the "quantum of proof" needed, all before discerning who was actually responsible for the pretrial delay. The impracticality of this process demonstrates the benefit of a fluid balancing test as opposed to a rigid, step-by-step analysis. By misinterpreting the "intensifying presumption" and requiring a "quantum of proof" analysis under the length of delay factor, to the exclusion of the other factors, the Montana Supreme Court obscured its speedy trial analysis from the outset.

2. *The Reasons for the Delay and the State's Burden of Proof*

Barker and its progeny did not define who has the burden of proof under a speedy trial constitutional challenge, because the federal speedy trial right analysis requires both parties to assign reasons for the delays under Factor Two. The analysis therefore contemplates an equal burden on both parties for explaining the pretrial delay.

However, *Barker*'s "reasons for delay" analysis devolved through state and federal law into a burden on the State to justify pretrial delay, which is neither compelled nor logical. *Barker* constitutionally placed the "burden on the courts and the prosecutors *to assure that cases are brought to trial*,"[214] because the "defendant has no duty to bring himself to trial; the State has that duty."[215] *Barker* required courts to examine "the reason[s] the government assigns to justify the delay."[216] The Ninth Circuit Court of Appeals, in *McNeely v. Blanas*,[217] erroneously interpreted this language as creating a burden on the State to explain pretrial delays, even when the delay is attributable to the defendant.[218]

214. *Id.* at 529 (emphasis added).

215. *Id.* at 527 (footnotes omitted).

216. *Id.* at 531.

217. *McNeely v. Blanas*, 336 F.3d 822 (9th Cir. 2003).

218. *Id.* at 827; *cf.* H. Richard Uviller, Barker v. Wingo*: Speedy Trial Gets a Fast Shuffle*, 72 Colum. L. Rev. 1376, 1386–87 (1972) (arguing that, although "[b]urden is never discussed by the Court . . . it may be safely assumed that it remains where normally lodged:

Surprisingly, the *McNeely* court in fact conceded that "*Barker* did not explicitly identify the burden of proof for pretrial delay."[219]

Despite the erroneous creation of a burden on the State to assign reasons for the length of delay in *McNeely*, the Ninth Circuit Court of Appeals's interpretation of federal law is not binding on states. The Montana Supreme Court is free to interpret federal constitutional law, regardless of federal circuit decisions.[220] The decision to impose a burden of proof on the State to explain pretrial delays should have been discarded as unnecessary in an already complex, byzantine analysis.

Under the *Barker* line of speedy trial jurisprudence, both the State and the defendant should bear the burden of assigning reasons for the delay to assist trial courts, as both the State and the defendant may share culpability in delaying the trial. Often, the analysis consists of simply identifying who requested which continuances and for what reasons. Any competent defense attorney or attentive defendant would independently assign reasons for the delay to verify the State's reasons and correct any errors or misrepresentations to the court. The burden appears to assist the defendant only when the State is unable to provide a reason for a particular delay, as the unexplained delay is then weighted against the State and for the defendant.[221]

3. The Accused's Responses to the Delay

The third factor in the speedy trial analysis requires courts to examine the accused's responses to pretrial delay, given the totality of the circumstances.[222] Departing from *Bruce*'s "non-weighted, 'either you asserted the right or you did not' approach,"[223] the *Ariegwe* Court more closely aligned the third factor's analysis with the requirements of *Barker*. However, instead of staying the course with *Barker*'s simple totality of the circum-

upon the [defendant, or] moving party"). The U.S. Supreme Court rejected Uviller's analysis of *Barker*. *Doggett v. U.S.*, 505 U.S. 647, 652 n. 1 (1992).

219. *State v. Ariegwe*, 167 P.3d 815, 836–37 (Mont. 2007) (quoting *McNeely*, 336 F.3d at 826–27).

220. *See State v. Kills on Top*, 793 P.2d 1273, 1304 (Mont. 1990) (holding that the Ninth Circuit decision in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), was not binding on the Montana Supreme Court); *see e.g. State v. Dann*, 79 P.3d 58, 59 n. 2 (Ariz. 2003) (citing *State v. Sansing*, 77 P.3d 30, 33 n. 2 (Ariz. 2003) (explaining "[w]e are not bound by the Ninth Circuit's interpretation of what the Constitution requires") (citations omitted)).

221. *Ariegwe*, 167 P.3d at 837.

222. *Id.* at 840–41.

223. *Id.* at 839.

stances analysis, the Montana Supreme Court again charted new territory by expanding the inquiry to include "some considerations" for district courts to consider.

Barker adopted a weighted inquiry, examining the accused's response to the delay by asking "[w]hether and how a defendant asserts his right," an analysis "closely related to the other factors . . . mentioned."[224] Unfortunately, *Doggett* could not clarify this factor in the analysis because the defendant was unaware of the indictment against him and therefore could not object to the delay.[225]

However, from *Barker*'s simple command, *Ariegwe* expanded the accused's response inquiry into a three-part test, requiring practitioners to (1) evaluate the accused's responses to the delay by examining several "considerations" and (2) apply a totality of the circumstances analysis, while (3) using the accused's responses to gauge the weights of the other factors.[226] "*Some* considerations" include "the timeliness, persistence, and sincerity of the objections, the reasons for the acquiescence, whether the accused was represented by counsel, [and] the accused's pretrial conduct (as that conduct bears on the speedy trial right)."[227] Further complicating the analysis, "[t]he timing and number of instances in which the accused objects to pretrial delay are not talismanic [and] a pro forma motion to dismiss on speedy trial grounds is itself only marginal evidence of a desire to be brought to trial."[228]

The confusion regarding the defendant's assertion of his or her speedy trial right may stem from the *Barker* opinion, which contains seemingly ambiguous language. Indeed, the "considerations" enunciated in the *Ariegwe* opinion track language of the U.S. Supreme Court's *Barker* opinion.[229] However, the Montana Supreme Court misconstrued language from *Barker* as elements required for a speedy trial analysis.

For example, the U.S. Supreme Court, in rejecting the demand-waiver doctrine[230] as too rigid, articulated that

224. *Barker v. Wingo*, 407 U.S. 514, 531 (1972).

225. *Doggett v. U.S.*, 505 U.S. 647, 653–54 (1992).

226. *Ariegwe*, 167 P.3d at 840–41.

227. *Id.* at 841, 849–50 (emphasis added).

228. *Id.* at 841.

229. *See Barker*, 407 U.S. at 528–31.

230. *Id.* at 525 (explaining "[t]he demand-waiver doctrine provides that a defendant waives any consideration of his right to speedy trial for any period prior to which he has not demanded a trial").

> the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right . . . [because i]t would . . . allow a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely *pro forma* objection.[231]

The Court was not attaching a weight to a *pro forma* objection, but arguing that a discretionary weighing approach was more appropriate.

The Montana Supreme Court apparently interpreted this statement against the demand-waiver doctrine as instructing courts to weigh a *pro forma* motion as "marginal evidence of a desire to be brought to trial."[232] However, such a conclusion is antithetical to *Barker*'s holding, which emphasized that "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."[233] In fact, the "defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right."[234]

The analytical chasm between *Ariegwe*'s assertion of the right analysis and *Barker*'s is too wide to logically bridge. Indeed, the Montana Supreme Court's interpretation may conflict with its own purported weighing and balancing approach. Under *Barker*, a court may attach any weight it deems appropriate to any objection to delay, including a *pro forma* motion to dismiss. District courts should be accorded the flexibility and discretion to assign whatever weight deemed appropriate to a defendant's responses.

In effect, Montana district courts are now required to be mind-readers, using extra-sensory judicial perception to determine whether the defendant truly wants to be brought to trial speedily. How are district courts to determine the defendant's reasons for acquiescing in the State's delay? How must trial courts distinguish between an "evidentially marginal *pro forma* motion to dismiss"[235] and a sincere "objection to delay [that] could take the form of a motion to dismiss on speedy trial grounds?"[236] Moreover, how do courts determine the "sincerity" of the defen-

231. *Id.* at 528–29 (reflecting a concern that counsel for defendants, after being appointed, would file "an automatic, *pro forma* demand" to ensure their clients did not waive their right to a speedy trial).

232. *Ariegwe*, 167 P.3d at 841.

233. *Barker*, 407 U.S. at 532.

234. *Id.* at 531–32.

235. *Ariegwe*, 167 P.3d at 841.

236. *Id.* at 840.

dant's objections? These questions must somehow be answered in the gray area between the defendant's silence and the Montana Supreme Court's caution not to "complain early and often."[237]

4. Prejudice to the Accused

Prejudice to the accused, the final factor under *Barker*'s framework, has proven the most vexing factor in the speedy trial analysis. Questions regarding the burden of proof and the quantum of evidence needed to establish prejudice have consistently dogged the U.S. Supreme Court.[238] The *Barker* opinion examined prejudice "in the light of the interests of defendants which the speedy trial right was designed to protect."[239] Specifically, the Court identified three such interests: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired."[240]

The U.S. Supreme Court, in *Barker*, identified numerous concerns that could arise out of a delayed trial, all to the detriment of the defendant: the death or disappearance of witnesses; loss of memory or accurate recall for the defendant or defense witnesses; loss of a job; disruption of family life; reinforcement of idleness;[241] hindrance to the defendant's "ability to gather evidence, contact witnesses, or otherwise prepare his defense"; restraint of liberty; and a forced life "under a cloud of anxiety, suspicion, and often hostility."[242] However, the Court was primarily concerned with the consequences of delay to the accused's defense and his ability to meet the government's allegations. *Barker*'s progeny did nothing to change the focus of that concern. Under the prejudice prong, courts must focus on the damage to the defendant's ability to present a defense. The more time spent in jail, the more damage to the fabric of the defendant's case.[243]

The *Ariegwe* Court expanded that focus to include concerns that were neither contemplated nor compelled by the U.S. Su-

237. *Id.* at 841.

238. *See U.S. v. Marion*, 404 U.S. 307, 320 (1971); *Barker*, 407 U.S. at 532; *U.S. v. MacDonald*, 456 U.S. 1, 8 (1982); *U.S. v. Loud Hawk*, 474 U.S. 302, 311 (1986); *Doggett v. U.S.*, 505 U.S. 647, 655–58 (1992).

239. *Barker*, 407 U.S. at 532.

240. *Id.* (citations omitted).

241. *Id.* (referring to the "little or no recreational or rehabilitative programs" in jail).

242. *Id.* at 533.

243. *Id.* at 532.

preme Court in interpreting the Sixth Amendment. Although the Court correctly required examination of the three subfactors identified by *Barker*,[244] it misinterpreted the analytical focus and scope of the prejudice analysis.

a. Oppressive Pretrial Incarceration

As described above, inquiry into the oppressiveness of pretrial incarceration has always focused on adverse legal and societal consequences to the defendant, such as loss of witnesses, memories, and evidence, as well as disruption to employment, family life, and the preparation of the defendant's case.[245] Pending criminal charges "may subject [the defendant] to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes."[246] In *Klopfer v. North Carolina*, the U.S. Supreme Court held the prosecution violated the defendant's right to a speedy trial by prolonging this oppression "as well as the 'anxiety and concern accompanying public accusation.' "[247]

However, out of whole cloth not darned by any binding precedent, the Montana Supreme Court cut a new swath of analysis by requiring courts to examine the conditions of the defendant's incarceration as a factor under the oppressiveness prong of prejudice.[248] This inquiry has never been recognized in any examination of prejudice in the entire line of federal jurisprudence regarding a defendant's speedy trial right under the Sixth Amendment.[249] Thus, it is not surprising that little support can be garnered for such a proposition from either federal or Montana case law.

244. *State v. Ariegwe*, 167 P.3d 815, 842 (Mont. 2007) (examining the (1) oppressiveness of pretrial incarceration; (2) prolonged disruption of the defendant's life; and (3) impairment of the accused's ability to present an effective defense).

245. *Barker*, 407 U.S. at 532–33 (referring to the defendant's idleness resulting from the "little or no recreational or rehabilitative programs" in jail).

246. *Klopfer v. N.C.*, 386 U.S. 213, 222 (1967).

247. *Id.* (quoting *U.S. v. Ewell*, 383 U.S. 116, 120 (1966)).

248. *Ariegwe*, 167 P.3d at 844.

249. *See e.g. U.S. v. Loud Hawk*, 474 U.S. 302, 312 (1986) (recognizing that the right does not shield a defendant from every expense or inconvenience; the core concern of the speedy trial right is liberty); *U.S. v. MacDonald*, 456 U.S. 1, 10–11 (1982) (not reaching the prejudice prong); *U.S. v. Marion*, 404 U.S. 307, 320–22 (1971) (not mentioning the conditions of confinement); *Klopfer v. N.C.*, 386 U.S. 213, 222 (1967) (focusing on legal and societal consequences).

In requiring an examination into the "conditions of confinement," the Court cited *Wells v. Petsock*,[250] a Third Circuit Court of Appeals case denying a defendant's speedy trial claim,[251] as well as *State v. Johnson*,[252] a Montana Supreme Court decision that held similarly.[253] However, *Wells* addressed the "conditions of confinement" under *Barker*'s length of delay factor, not prejudice.[254] Such an analysis would seem to suggest that the court focused on the defendant's liberty interest as the core concern of the speedy trial right, as closely related to the time spent incarcerated prior to trial.

Second, *Wells*'s only support for its determination that the "conditions of confinement" were a proper focus for the speedy trial analysis was an inferential reference to a dissenting opinion in *Ringstaff v. Howard*,[255] an Eleventh Circuit Court of Appeals case.[256] *Ringstaff*, in turn, inferentially relied on two cases for its legal basis,[257] *Dothard v. Rawlinson*[258] and *Pugh v. Locke*.[259] The journey down this legal rabbit hole finally arrives at an intelligible discovery—both *Dothard* and *Pugh* were civil actions. *Dothard* involved a Civil Rights Act suit by a female applicant denied employment as an Alabama State Penitentiary correctional counselor,[260] while *Pugh* involved a class action 42 U.S.C.A. § 1983 suit by prisoners complaining about the Alabama Penitentiary's conditions of confinement.[261] *Dothard* and *Pugh* serve as the indelible legal lesson: there are proper civil vehicles by which to lodge complaints regarding violations of civil rights or, more importantly here, conditions of confinement.

The Montana Supreme Court's additional reliance on its own precedent, *State v. Johnson*, was likewise misplaced and unavailing. The defendant in *Johnson* asserted that he had been denied appropriate medical treatment while incarcerated prior to trial.[262]

250. *Wells v. Petsock*, 941 F.2d 253 (3d Cir. 1991).

251. *Id.* at 257.

252. *State v. Johnson*, 4 P.3d 654 (Mont. 2000).

253. *Id.* at 674–75, 678 (considering and rejecting defendant's claims of inadequate medical attention under "oppressive pretrial incarceration" prong of prejudice factor).

254. *Wells*, 941 F.2d at 257.

255. *Ringstaff v. Howard*, 885 F.2d 1542 (11th Cir. 1989).

256. *Wells*, 941 F.2d at 257 (citing *Ringstaff*, 885 F.2d at 1548 (Johnson, J., dissenting)).

257. *Ringstaff*, 885 F.2d at 1548 (Johnson, J., dissenting).

258. *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

259. *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976).

260. *Dothard*, 433 U.S. at 323.

261. *Pugh*, 406 F. Supp. at 321–22.

262. *State v. Johnson*, 4 P.3d 654, 660 (Mont. 2000).

It was this medical treatment complaint that erroneously birthed a "conditions of incarceration" focus. The *Johnson* Court had no legal authority for such an inquiry; the analysis was entirely factual. Similarly, the *Ariegwe* Court cited no legal authority when detailing the numerous possible conditions of incarceration that a defendant may encounter, because none exists for such an inquiry in this context. Such an analysis would be tenuous and marginally appropriate under a speedy trial examination only if it bore some direct relation to the anxiety and concern suffered by the defendant, thus demonstrating prejudice.

Ultimately, however, concern for the defendant's conditions of incarceration has no place in the examination of a defendant's speedy trial right. There is no legal or factual support for such concern under the Sixth Amendment, and no case law compels the analysis. Otherwise, defendants would be wise to assert they were suffering distressing conditions of incarceration and compel courts to conduct evidentiary hearings to determine whether these claims are verifiable. The end result would be more delay, which could likely be held against the State under *Barker*'s analysis, as well as a waste of time and resources for prosecutors and courts.

The Montana Supreme Court's addition of other considerations under the "oppressive pretrial incarceration" prong yielded no better results. *Ariegwe* requires courts and practitioners to also evaluate (1) the duration of the incarceration; (2) the complexity of the charged offense(s); and (3) any misconduct on the part of the accused directly related to the pretrial incarceration.[263] The duration of the defendant's incarceration is the proper focus for the oppressiveness of his incarceration. However, it is unclear how the complexity of the charged offense relates to whether pretrial incarceration is oppressive or prejudicial to the defendant. The Court's citation to *Barker* for this idea[264] is unpersuasive. *Barker* discussed the complexity of the charge in relation to the *length of delay* required to trigger the speedy trial inquiry, not prejudice.[265]

Likewise, the accused's misconduct is not relevant. The basic idea propounded by the Court was that, if the defendant is incarcerated prior to trial because he is a flight risk, his incarceration

263. *State v. Ariegwe*, 167 P.3d 815, 843 (Mont. 2007).

264. *Id.* (citing *Barker v. Wingo*, 407 U.S. 514, 531 (1972) (noting "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge")).

265. *Barker*, 407 U.S. at 530–31.

is less likely to be oppressive, ostensibly because it was self-inflicted.[266] However, the reason for the defendant's pretrial incarceration—whether it be his propensity to flee or a financial inability to post bail—should not serve as a potential scapegoat for excessive pretrial delay. A defendant's right to a speedy trial could arguably be violated despite the fact that he was incarcerated as a flight risk. Hence, the proper focus of the "oppressive pretrial incarceration" inquiry is the duration of the incarceration.

The Montana Supreme Court, in attempting to clarify its analysis, lost sight of this focus. It is again apparent why the *Barker* Court enunciated a fluid test, balancing numerous factors as they arose instead of trying to chart every conceivable prejudice. Most importantly, *Barker*'s own admonition was to evaluate the four "related factors [and consider them] together with *such other circumstances* as may be relevant."[267] The U.S. Supreme Court was aware then that certain factors or circumstances would logically defy labels yet still be appropriate concerns under the speedy trial test.

b. Anxiety and Concern

The Montana Supreme Court aptly characterized the "anxiety and concern" inquiry as "more subjective, not to mention difficult to demonstrate," noting "[t]he [U.S.] Supreme Court has described the interest . . . in relatively broad terms."[268] In considering Ariegwe's claim, the Montana Supreme Court struggled with the difficult task of adequately addressing the critical and elusive distinction between disruption that is inherent in being charged with a crime—and therefore acceptable—and that caused by undue delay in violation of the Sixth Amendment. With a sense of foreshadowing, the Court went to great lengths to emphasize that "a certain amount of anxiety and concern is inherent in being accused of a crime," and the right to speedy trial serves to minimize, not eliminate, that suffering.[269]

Ariegwe presented several instances in which he claimed to have suffered anxiety and concern due to pretrial delay, above and beyond any suffering caused by the charges themselves. His relationship with his ex-wife, with whom he still resided, became

266. *Ariegwe*, 167 P.3d at 843.
267. *Barker*, 407 U.S. at 533 (emphasis added).
268. *Ariegwe*, 167 P.3d at 844.
269. *Id.* at 845.

strained.[270] He testified that he felt compelled to resign from his job as a youth counselor, and could not find similar employment due to the pending charges.[271] He presented a letter from a licensed clinical social worker confirming that he "was experiencing moderate to at times a severe level of anxiety."[272]

The Court, however, agreed with the district court's finding that

> the *primary* source of Ariegwe's anxiety and concern was the nature of the charged offenses and . . . while the delay in bringing him to trial had contributed somewhat to Ariegwe's anxiety and concern, it did not substantially aggravate it . . . to the extent warranting dismissal *on that factor alone*.[273]

It is worrisome that the Montana Supreme Court adopted, without comment, this problematic finding of the district court. First, both the U.S. Supreme Court and Montana Supreme Court have made clear that no one factor is dispositive, so Ariegwe's evidence of anxiety and concern was held to an erroneous standard if the district court required it alone to warrant dismissal. Rather, the fact that the delay did cause some of Ariegwe's concern should have been factored into the overall balancing test. Thus, the district court's language is alarming because it suggests a misapplication of even *Bruce*. Nonetheless, the Court upheld the district court's apportionment of Ariegwe's anxiety and concern as "not clearly erroneous."[274]

Second, a defendant's claim should not automatically fail just because the "primary source" of his anxiety and concern is the charges. Indeed, this will often be the case. From the start, Ariegwe conceded that some of his anxiety and concern was attributable solely to the charges against him.[275] However, he argued "there's a difference between being subject to these kinds of stressors in one's life for a period of 90 days or 180 days . . . and being subjected to those stresses for a period of 380 days."[276] A defendant who suffers anxiety and concern due to the charges against him suffers increasingly with each day that passes without the charges being resolved. Thus, even absent particularized evidence of anxiety and concern like that presented by Ariegwe, the defen-

270. *Id.* at 856–57.
271. *Id.* at 857.
272. *Id.* (internal quotations omitted).
273. *Id.* at 857–58 (emphasis added; internal quotations omitted).
274. *Ariegwe*, 167 P.3d at 858.
275. *Id.* at 857.
276. *Id.*

dant who is aware of the charges against him is entitled to a presumption of increasing anxiety and concern as delay continues.[277]

The Court also declined to consider Ariegwe's evidence of anxiety suffered by his family, although its reason was not entirely clear. The Court first noted that, in order to be relevant to Ariegwe's argument of prejudice, the anxiety and concern suffered by Ariegwe's wife and children would have had to affect him. However, the Court never explained whether the evidence at issue met this requirement, apparently because it determined that all Ariegwe's evidence of anxiety and concern, including that suffered by his family, resulted from the charges rather than an excessive delay.

While the Court correctly noted that the speedy trial right does not eliminate anxiety and concern,[278] it failed to give equal credence to the flip side of its observation: the guarantee still serves "to *shorten* the disruption of life caused by arrest and the presence of unresolved criminal charges."[279] Even if Ariegwe was unable to show sufficient prejudice to succeed in his overall right to speedy trial claim—as very well may have been the case—a thorough right to speedy trial analysis required consideration of the anxiety and concern suffered by the defendant as a result of delay. This is true regardless of whether the defendant also suffered a great deal of anxiety and concern due to the charges. Even though the Court agreed with Ariegwe that "anxiety and concern caused by the nature of the charged offenses may be unduly prolonged in a given case," it summarily concluded that Ariegwe did not demonstrate that happened here.[280] Given the Court's earlier finding under the first factor that the length of the delay required the State to "make a highly persuasive showing that Ariegwe was not prejudiced by the delay,"[281] it is interesting that the burden seemed to end up on Mr. Ariegwe to show that the delay "substantially aggravate[d]" or "unduly prolonged" his anxiety and concern.[282]

277. *Cf. Doggett v. U.S.*, 505 U.S. 647, 655 (1992) (holding excessive delay creates a presumption that the defendant's ability to defend his case has been impaired).

278. *Ariegwe*, 167 P.3d at 857.

279. *Id.* (quoting *U.S. v. MacDonald*, 456 U.S. 1, 8 (1982)) (emphasis in original; internal quotations omitted).

280. *Id.*

281. *Id.* at 856.

282. *Id.* at 857–58.

c. Impairment of the Defendant's Defense by the Delay

The final factor in the prejudice analysis, the impairment of one's defense, has been described by the U.S. Supreme Court as the "most serious . . . because the inability of a defendant adequately to prepare his case skews the fairness of the entire system."[283] What began as an inquiry into the possible prejudice suffered by the defendant in the speedy trial context has diverged into two conflicting analyses under federal law. One line of inquiry considers defense prejudice as one factor of the four to be considered in assessing a defendant's speedy trial rights—a consideration important to, but not the sole purpose of, the speedy trial right.[284] The second line of defense prejudice reasoning holds that after a substantial passage of time, the presumption of prejudice is so great that a defendant's right to a speedy trial has been violated.[285]

The first line of analysis—prejudice as one factor to be considered—began with *Marion* and continued through *Barker*, *MacDonald*, and *Loud Hawk*. The U.S. Supreme Court held in *Marion* that inordinate delay may prejudice a defendant's ability to effectively challenge the Government's accusation. However, "the major evils protected against by the speedy trial guarantee *exist quite apart from actual or possible prejudice to an accused's defense.*"[286] Further, the Court declared that the "possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context. Possible prejudice is inherent in any delay, however short."[287]

The *Barker* decision did nothing to change the prejudice analysis set forth in *Marion*, noting that "[p]rejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect."[288] *MacDonald* provided perhaps the most pronounced endorsement of prejudice to

283. *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

284. *See U.S. v. Marion*, 404 U.S. 307, 320 (1971); *Barker*, 407 U.S. at 532; *U.S. v. MacDonald*, 456 U.S. 1, 8 (1982); *U.S. v. Loud Hawk*, 474 U.S. 302, 311 (1986).

285. *Doggett v. U.S.*, 505 U.S. 647, 655–58 (1992).

286. *Marion*, 404 U.S. at 320 (emphasis added).

287. *Id.* at 322.

288. *Barker*, 407 U.S. at 532. Justice Thomas, in his dissent in *Doggett*, believed *Barker* stood for the proposition that limiting the possibility of impairment to the accused's defense "is an independent and fundamental objective of the Speedy Trial Clause," while *Marion*, *MacDonald* and *Loud Hawk* held it was not. *Doggett*, 505 U.S. at 662 (Thomas, J., Rehnquist, C.J. & Scalia, J., dissenting).

the defense as only one factor among several to consider in the speedy trial analysis:

> The Sixth Amendment right to a speedy trial is thus not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitation. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.[289]

Thus, it was settled law that prejudice to the defense, however great, presumptive or otherwise, would be considered along with the other factors set forth in *Barker*. This point was made particularly clear when the Court held that, after a five-year delay between arrest and trial, four years of which were attributable to the prosecution's failures, Barker's right to a speedy trial had not been violated.[290]

Ten years after *MacDonald*, the Court modified its position on the Sixth Amendment's fundamental liberty concern. In *Doggett*, the Court held that the eight-and-a-half year delay between the defendant's indictment and his arrest was so presumptively prejudicial to his case that it required reversal of his conviction and sentence, despite no impairment of his liberty or demonstrable prejudice.[291] The Court, in finding reversible presumptive prejudice in *Doggett*, refused to acknowledge conflicting precedent.[292] Left without reconciliation, *Doggett*, as the most recent pronouncement of prejudice in the context of the speedy trial right, instructs that such presumptive prejudice can amount to an independent and fundamental violation of the Sixth Amendment.

The Montana Supreme Court failed to explicitly adopt *Doggett*'s holding.[293] Rather, *Ariegwe* cautioned courts that "consideration of prejudice is not limited to the specifically demonstrable [because] excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify."[294] The *Ariegwe* Court emphasized the difficulty of demonstrating damage to the fabric of the defendant's case, and

289. *MacDonald*, 456 U.S. at 8.

290. *Barker*, 407 U.S. at 533, 536.

291. *Doggett*, 505 U.S. at 657–58.

292. *Id.* at 662 (Thomas, J., Rehnquist, C.J. & Scalia, J., dissenting) (stating "[t]he Court refuses to acknowledge this conflict").

293. *State v. Ariegwe*, 167 P.3d 815, 845 n. 7 (Mont. 2007).

294. *Id.* at 846 (quoting *Doggett*, 505 U.S. at 655) (internal quotations omitted).

that "affirmative proof of particularized prejudice is not essential to every speedy trial claim."[295]

Despite affirming the tenet that prejudice is not always demonstrable, the Montana Supreme Court concluded that

> in the absence of affirmative proof that the delay has impaired the accused's ability to present an effective defense, *impairment must be assessed based on other factors in the analysis*—e.g., the length of the delay . . . , the accused's responses to the delay . . . , and the duration of the pretrial incarceration.[296]

The conclusion appears to shirk *Doggett*'s reasoning, instead returning to the factor's analysis set forth in *Barker* and progeny.[297] By failing to account for a presumption of prejudice that could evolve or intensify into fundamental prejudice, regardless of the defendant's liberty interest, *Ariegwe* may violate *Doggett*. However, the Montana Supreme Court's holding does comport with the holdings and spirit of *Marion*, *Barker*, *MacDonald*, and *Loud Hawk*, which focused on a defendant's liberty interest under the speedy trial analysis. Time may tell whether a defendant in Montana will experience such extraordinary delay that he or she will seek refuge from the rains of delay under the umbrella of *Doggett*, regardless of incarceration or the other *Barker* factors. How will the Montana Supreme Court treat such extraordinary delay after *Ariegwe*?

5. *The Balancing Act*

The U.S. Supreme Court has consistently interpreted the Sixth Amendment as requiring courts to balance the four factors of the right to speedy trial analysis in a sensitive, flexible, case-by-case analysis, regarding none of the factors as dispositive.[298] The Montana Supreme Court in *Ariegwe* announced the same balancing approach requirement and compelled lower courts to weigh the four factors by attributing varying significance to each factor based on the unique facts and circumstances of each case.[299] By

295. *Id.* (quoting *Doggett*, 505 U.S. at 655) (internal quotations omitted).

296. *Id.* (emphasis added).

297. *Id.* at 829 (stating that "presuming prejudice based on nothing more than the State's failure to prove the contrary is not, in our view, an accurate basis on which to evaluate a speedy trial claim").

298. *See U.S. v. Marion*, 404 U.S. 307, 325–26 (1971); *Barker v. Wingo*, 407 U.S. 514, 533 (1972); *U.S. v. Loud Hawk*, 474 U.S. 302, 314 (1986); *Doggett*, 505 U.S. at 651, 655–56 (adhering to the balancing approach, but holding that the presumptive prejudice was sufficient for reversal, and thus reasonably interpreted as dispositive).

299. *Ariegwe*, 167 P.3d at 847.

requiring a balancing examination of the speedy trial factors, the Montana Supreme Court escapes the obvious reaction to its "three single-spaced pages" test: the Court has essentially created a "checklist" for lower courts.

However, in the end, it is still up to trial courts to assign weights to each factor and balance those factors in an inherently case-by-case process that will surely differ from court to court. In sum, it is puzzling why the Court went to such great lengths to create such a detailed, structured analysis, when in the end the factors are thrown back into a giant melting pot of individual judgment, to be stirred and seasoned to the liking of the trial court anyway. In a variation on the old saying, "six of one, half a dozen of the other," it will be interesting to see whether the new test is really an improvement, or simply a lot more work.

C. *How* Ariegwe *Could Violate a Defendant's Speedy Trial Right under the Sixth Amendment*

Perhaps the most troubling question raised by *Ariegwe* is whether, in some instances, the rigid, detailed structure of the right to speedy trial analysis required under *Ariegwe* could actually restrict a defendant's right to speedy trial beyond what the U.S. Supreme Court envisioned under the Sixth Amendment and *Barker*. Could a defendant's speedy trial claim succeed under a fluid, true balancing test such as that set forth in *Barker*, while simultaneously failing under a mechanical test like *Ariegwe*? If so, the *Ariegwe* test is unconstitutional.

The Montana Supreme Court encountered a similar predicament less than two years ago, involving another fundamental due process right. Twenty-five years ago, the Montana Supreme Court adopted the "totality of the circumstances" test[300] set forth by the U.S. Supreme Court in *Illinois v. Gates*,[301] to determine whether probable cause existed to justify issuance of a search warrant. In doing so, the Montana Supreme Court acknowledged that *Gates*'s "totality of the circumstances approach" was preferable to "any rigid demand that specific tests be satisfied by every informant's tip."[302]

300. *State v. Kelly*, 668 P.2d 1032, 1045 (Mont. 1983) (citing *Ill. v. Gates*, 462 U.S. 213, 231 (1983)).

301. *Ill. v. Gates*, 462 U.S. 213 (1983).

302. *Kelly*, 668 P.2d at 1044 (quoting *Gates*, 462 U.S. at 230–31 (emphasis added; internal quotations omitted)).

However, almost twenty years later, in *State v. Reesman*,[303] the Court decided to augment the probable cause analysis with "certain indelible threshold rules [that] have emerged."[304] The Court again acknowledged the fluid principle of the *Gates* test, but proceeded nonetheless to set forth a "step-by-step analysis."[305] This analysis included a requirement that anonymous tips be independently corroborated by police.[306]

While the Court's attempt to simplify practitioners' work was commendable, it was not long before a case came before the Court that illustrated the problem with reading too much into a constitutional due process rights analysis. In *State v. Barnaby*,[307] "police receive[d] reliable reports from several concerned citizens yet no single report satisfie[d] all the *Reesman* criteria."[308] The Court reluctantly overruled its *Reesman* requirement regarding independent police corroboration,[309] explaining:

> [W]e cannot easily reconcile *Reesman*'s strict rules . . . with the flexibility of the totality of the circumstances test. Probable cause poses a fluid concept turning on the assessment of probabilities in a particular factual context, "not readily, or even usefully, reduced to a neat set of legal rules."[310]

Thus, the Court implicitly acknowledged that *Reesman*'s overspecificity was unconstitutional and abandoned it in favor of a broader, more flexible interpretation.

The *Ariegwe* Court's right to speedy trial analysis is discomfortingly reminiscent of its well-intentioned but ultimately problematic efforts in *Reesman*. As discussed above, it is simply not clear that all the subfactors set forth by the Court are a required part of every analysis. Some subfactors, such as the conditions of the defendant's incarceration, may rarely be appropriate in any analysis,[311] while the Court rejected other subfactors, such as anxiety and concern suffered by the defendant's family, that could be relevant to a defendant's claim.[312]

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303. *State v. Reesman*, 10 P.3d 83 (Mont. 2000).

304. *Id.* at 89.

305. *Id.*

306. *Id.*

307. *State v. Barnaby*, 142 P.3d 809 (Mont. 2006).

308. *Id.*

309. *Id.*

310. *Id.* at 818 (quoting *Ill. v. Gates*, 462 U.S. 213, 232 (1983)) (internal quotations omitted).

311. *Supra* nn. 249–50 and accompanying text.

312. *Supra* n. 276 and accompanying text.

Notably, the Court in *Ariegwe* did not say the factors it set forth were the only ones that could be considered—in fact, it expressly acknowledged *Barker*'s warning that the factors are not exclusive and none are dispositive.[313] However, the Court's elucidation of a test with such specificity increases the likelihood that practitioners will view the doctrine through the lens of *expressio unius est exclusio alterius*,[314] mistakenly assuming that what was not expressly stated was intentionally excluded and irrelevant. The temptation to pigeonhole facts into the three-page outline may be too great for some to resist. Such an intricate test, by its very nature, will hinder the ability of courts and practitioners to conduct a fluid speedy trial analysis that is responsive to the facts and circumstances at hand.

Unfortunately, such rigid compartmentalization and preordained analysis may also hinder some defendants' speedy trial claims. Such a situation may not be readily apparent, but, then again, the *Reesman* Court probably did not contemplate the unique facts of Mr. Barnaby's situation until his case was before them. It is not impossible to imagine a hypothetical situation in which a defendant's right to speedy trial claim could succeed under *Barker*'s four factors, but would not survive *Ariegwe*'s three-page outline. Mr. Ariegwe himself provides a suitable fact scenario for exploring this possibility, and one that is already familiar.

Under *Barker*, Mr. Ariegwe's speedy trial claim might have succeeded. The only factor the Court found to weigh against Ariegwe's claim was Factor Four, regarding whether the trial delay prejudiced Ariegwe.[315] Assuming *arguendo* the first three factors remained in his favor, a successful showing of prejudice under the fourth factor would have necessarily tipped the entire analysis in his favor. Of the three interests protected under Factor Four—oppressive pretrial incarceration, impairment of defense, and pretrial anxiety and concern—the Court (and Ariegwe) considered only the third interest of pretrial anxiety and concern to be at issue.[316] More specifically, the question was whether the delay caused Ariegwe to suffer anxiety and concern due to "the presence of unresolved criminal charges."[317] It is also important to keep in

313. *State v. Ariegwe*, 167 P.3d 815, 847 (Mont. 2007).

314. *Black's Law Dictionary* 620 (Bryan A. Garner ed., 8th ed., West 2004) (defining the term as "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative").

315. *Ariegwe*, 167 P.3d at 858.

316. *Id.* at 856.

317. *Id.*

mind that the Court had already concluded that, based on the length of delay under Factor One, the State had to "make a highly persuasive showing that Ariegwe was not prejudiced by the delay, while the quantum of proof that may be expected of Ariegwe . . . is correspondingly lower."[318]

Despite having relatively clear guidance from the U.S. Supreme Court, the Montana Supreme Court unnecessarily, and perhaps unconstitutionally, narrowed the gauntlet for Ariegwe's claim. First, although the Court acknowledged that "the delay in this case somewhat aggravated the anxiety and concern that are inherent in being accused of a crime," it rejected as insufficient Ariegwe's evidence in that regard.[319] With little explanation, the Court indicated the delay had to be the "primary source" of Ariegwe's anxiety and concern, and decided it was not.[320] Granted, Ariegwe could not show oppressive pretrial incarceration or impairment to his defense. However, these are interests the speedy trial right is intended to protect,[321] not requirements a defendant must fulfill.[322]

As explained above, the Montana Supreme Court also never considered the evidence of anxiety and concern suffered by Ariegwe's family.[323] Ariegwe presented evidence that his relationship with his ex-wife, with whom he still resided, became strained.[324] She testified at the speedy trial hearing that she was unable to sleep due to anxiety and fear for her family.[325] Indeed, their child was "taunted at school."[326] Ariegwe also waited under the threat of possible deportation to Nigeria, which would mean separation from his children,[327] a possibility that would create anxiety and concern in the family as a whole. However, based upon its conclusion that these pieces of evidence were irrelevant, the Court never considered them.

By considering Ariegwe's claim under an even slightly more rigorous test, the Montana Supreme Court restricted his right to

318. *Id.*
319. *Id.* at 858.
320. *Id.*
321. *U.S. v. Ewell*, 383 U.S. 116, 120 (1966).
322. *Barker v. Wingo*, 407 U.S. 514, 533 (1972) (holding no one factor is "necessary or sufficient" to dispose of a defendant's speedy trial claim); *Ariegwe*, 167 P.3d at 847 (holding "none of the foregoing four factors is either a necessary or a sufficient condition").
323. *Id.* at 857.
324. *Id.* at 856–57.
325. *Ariegwe*, 167 P.3d at 857.
326. *Id.*
327. *Id.*

speedy trial beyond that contemplated by the Sixth Amendment as interpreted by the U.S. Supreme Court. In determining whether Ariegwe experienced undue anxiety and concern awaiting trial, the U.S. Supreme Court might have considered evidence of anxiety and concern experienced not only by Ariegwe but his friends and family as well, to the extent it affected Ariegwe. It would have looked at the evidence of anxiety and concern with regard to the length of delay, not necessarily with regard to whether it would have happened anyway given the charges against Ariegwe. The "intensifying presumption of prejudice" would have required the State to shoulder the burden of showing the delay did not prejudice Ariegwe. The U.S. Supreme Court might also have considered other relevant factors beyond the four outlined in *Barker*. While it is impossible to know for certain whether Ariegwe's speedy trial claim would have succeeded under the Sixth Amendment, even a slightly broader analysis under the "anxiety and concern" prong of Factor Four could well have had a domino effect, tipping this factor, and thus the entire analysis, in Ariegwe's favor.

*D. The Right to Speedy Trial Post-*Ariegwe*: What Can Practitioners Really Expect?*

The few right to speedy trial appeals that have been considered by the Montana Supreme Court following *Ariegwe* provide limited guidance. Two such cases have come before the Court: *State v. Billman*[328] and *State v. Smith*.[329] In both, the Court declined to hear the defendants' speedy trial claims, explaining in summary fashion that because the defendants briefed their claims prior to issuance of *Ariegwe*, it was appropriate to remand the claims to the district courts.[330]

Justice Nelson dissented from both remand orders, explaining several concerns in *Billman*. First, he pointed out that the Court did not need to remand the speedy trial issue in the case because the Court had a sufficient trial record before it to decide whether the defendant's right to speedy trial was violated.[331] Second, he noted that the Court did not need to remand because it reviews a question of constitutional law, like the right to speedy trial, de

328. *State v. Billman*, No. 06-0753 (Mont. Nov. 7, 2007).
329. *State v. Smith*, 176 P.3d 258 (Mont. 2008).
330. *Id.* at 262; Or. at 1, *State v. Billman*, No. 06-0753 (Mont. Nov. 7, 2007).
331. Or. at 3, *State v. Billman*, No. 06-0753 (Mont. Nov. 7, 2007).

novo anyway.[332] Third, he pointed to the fact that the State had requested the Court to perform a speedy trial analysis in this case like it did in *Ariegwe*.[333] Fourth, Justice Nelson argued that remanding the case would simply prolong final resolution of the defendant's claim and waste further time and resources.[334] Fifth, he took issue with the Court's failure to provide any justification for its decision to remand, beyond merely " 'deem[ing] it appropriate' to do so."[335] He argued that *Ariegwe* provided ample authority for the Court to have taken a similar course of action in *Billman*.[336] Finally, he argued that the Court's remand of the case to the district "needlessly hamper[ed] the State's legitimate interest in prosecuting the charges . . . and infringe[d] Billman's constitutional rights."[337] Justice Nelson, in his dissent from the Court's remand order in *Smith*, simply stated he dissented for the same reasons he dissented from the remand order in *Billman*.[338]

Justice Nelson rightfully points out several troubling inconsistencies between the Court's treatment of *Ariegwe* and its treatment of *Billman* and *Smith*. However, it is *Ariegwe* that appears to be the aberration. Following the Court's prior renovation of the right to speedy trial analysis in *City of Billings v. Bruce*, it had to consider a right to speedy trial claim—*State v. Hardaway*[339]—that had been briefed under its pre-*Bruce* analysis. In *Hardaway*, the Court remanded the speedy trial claim for reconsideration under *Bruce*, explaining "that the District Court and the parties did not, at the time [the defendant] moved for a dismissal based on lack of speedy trial, have the benefit of the *Bruce* decision."[340] Likewise, in *Ariegwe*, neither the parties nor the lower court had the opportunity to consider Ariegwe's motion under the test set forth in *Ariegwe*.[341] Although the Court did have a well-developed factual record before it in *Ariegwe*,[342] there is no evidence that it lacked such a record in *Hardaway*, *Billman*, or *Smith*, and yet it remanded those cases to the district court for rehearing under the newly effective law.

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332. *Id.*
333. *Id.*
334. *Id.* at 5.
335. *Id.*
336. *Id.*
337. Or. at 6, *State v. Billman*, No. 06-0753 (Mont. Nov. 7, 2007).
338. *State v. Smith*, 176 P.3d 258, 262 (Mont. 2008).
339. *State v. Hardaway*, 966 P.2d 125 (Mont. 1998).
340. *Id.* at 127.
341. *State v. Ariegwe*, 167 P.3d 815, 851 (Mont. 2007).
342. *Id.* at 852.

It is unclear which approach, if either, is correct, because the Court does not provide legal justification for either approach in any of the four cases. Rather, the decision whether to remand appears to be based on practical considerations in each case. Thus, Justice Nelson's criticism that the Court remanded in *Billman* and *Smith* solely because remand was "appropriate" applies equally to the reasoning behind the Court's decision not to remand in *Ariegwe*. It justified that decision on two grounds: (1) the factual record was well-developed; and (2) the revised test was so different from *Bruce* that courts and litigants would not be able to correctly apply the test unless the Court illustrated its use by applying it to Ariegwe's claim.[343]

However, neither ground provides legal authority for doing the trial court's job. In addition, application of the analysis is so dependent upon the facts of each case that illustrating its application in one case hardly ensures its uniform application thereafter. Regardless of whether the Court's lengthy, detailed analysis of Ariegwe's claim was a prudent use of its judicial time and resources, *Billman* and *Smith* indicate the Court has returned to remanding speedy trial appeals briefed prior to *Ariegwe*, even where the factual record before the Court is well-developed.

As for future cases to be analyzed under *Ariegwe*, practitioners will find the three-page outline provided by the Court to be a good starting point and would be wise to cover their bases by addressing all factors and subfactors to the extent possible and relevant, given the factual circumstances of the case. However, the outline provided by the Court may give practitioners and lower courts a false sense of security by suggesting that one need only follow the template provided, in a sort of paint-by-number approach to analyzing whether a defendant's right to speedy trial has been violated. In actuality, the required analysis may be much more complex and may add factors to, or remove factors from, those provided in the outline. It must be remembered that the factors provided in this outline, and in *Ariegwe* in general, are not an exhaustive list. Nor will every factor be relevant in every case. Thus, practitioners and courts must use the outline as a guide to, rather than the final word on, analysis of a defendant's right to speedy trial.

Considering the length and complexity of the right to speedy trial test the Montana Supreme Court has set forth, it will be in-

343. *Id.*

teresting to see whether the bar and the bench will turn to the Montana Legislature for a solution. Some states have enacted their own versions of the Federal Speedy Trial Act, providing specific and relatively short timeframes for prosecuting a defendant's case in state court.[344] Of course, such legislation is not without potential ramifications, including increased court dockets and caseloads, not to mention the fiscal impacts of such increases. However, faced with the daunting task of deciphering *Ariegwe*, practitioners and judges alike may seek the clarity that a legislative rule can provide, despite its drawbacks.

VII. CONCLUSION

Justice Powell observed in *Barker v. Wingo* that the right to speedy trial serves two competing interests—the defendant's interest in receiving a speedy trial and society's interest in ensuring the defendant receives one.[345] Among the factors and subfactors elucidated by the Court in *Barker*, there is no indication the Court intended for considerations like clarity and ease of application to exert a shaping force upon courts' analysis of this fundamental right. However, that is exactly what has happened in Montana. The tension between preserving the "vague" and "amorphous" quality of this right and quantifying it into a sort of production-line analysis has proved too great, and *Ariegwe* is the result.

It is always tempting to take what is vague and make it clear, especially if it means achieving uniformity and ease of application and consistency of results. However, such structure necessarily entails a certain amount of rigidity, which, if too great, can have the undesirable effect of suffocating justice. The amount of detail the Court has added to its right to speedy trial analysis may cause its efforts to miss their mark. This is especially true where that detail is unnecessary, insufficiently supported by legal authority, or based on a misinterpretation of the authority that does exist.

Certainly, the shift from a step-by-step analysis to a balancing approach better reflects the approach envisioned by *Barker*. However, *Ariegwe* ultimately shifted the focus of right to speedy trial analysis from the ideals the right was meant to preserve to a

344. *See e.g.* Illinois Speedy Trial Act, 725 Ill. Compiled Stat. 5/103-5 (2007) (requiring trial within 120 days of arrest or, for defendants released on bail or recognizance, within 160 days of defendant's demand for trial); Colorado Speedy Trial Act, Colo. Rev. Stat. § 18-1-405 (Lexis 2007) (requiring trial within 6 months of entry of a guilty plea); Missouri Speedy Trial Act, Mo. Rev. Stat. § 545.780 (2007).

345. *Barker v. Wingo*, 407 U.S. 514, 519 (1972).

checklist of compartmentalized factors. That shift invokes the worries expressed by Justice Thomas over fifteen years ago, in his dissent from the U.S. Supreme Court's right to speedy trial opinion in *Doggett*:

> Our constitutional law has become ever more complex in recent decades. That is, in itself, a regrettable development, for the law draws force from the clarity of its command and the certainty of its application. As the complexity of legal doctrines increases, moreover, so too does the danger that their foundational principles will become obscured. I fear that danger has been realized here. So engrossed is the Court in applying the multifactor balancing test set forth in *Barker* that it loses sight of the nature and purpose of the speedy trial guarantee set forth in the Sixth Amendment. . . . *Barker*'s factors now appear to have taken on a life on their own.[346]

346. *Doggett v. U.S.*, 505 U.S. 645, 669–70 (1992) (Thomas, J., Rehnquist, C.J. & Scalia, J., dissenting).